Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142

FURTHER JOINT COMMENTS OF
THE NATIONAL MULTIFAMILY HOUSING COUNCIL,
THE NATIONAL APARTMENT ASSOCIATION,
THE COUNCIL FOR AFFORDABLE AND RURAL HOUSING, ICSC,
THE INSTITUTE OF REAL ESTATE MANAGEMENT, NAREIT,
THE NATIONAL LEASED HOUSING ASSOCIATION, AND
THE REAL ESTATE ROUNDTABLE
(the "Real Estate Associations")

Matthew C. Ames
Marci L. Frischkorn
HUBACHER AMES & TAYLOR, P.L.L.C.
11350 Random Hills Road
Suite 800
Fairfax, Virginia 22030
(703) 279-6526
Counsel for the Real Estate Associations

October 20, 2021

SUMMARY

The National Multifamily Housing Council, the National Apartment Association, the Council for Affordable and Rural Housing, ICSC, the Institute of Real Estate Management, Nareit, the National Leased Housing Association, and The Real Estate Roundtable (the "Real Estate Associations") submit these Further Comments in response to the Public Notice released on September 7, 2021 (the "*2021 Notice*"). The Real Estate Associations represent a broad array of real estate industry sectors, including for-profit and non-profit owners, operators, developers of rental residential properties, both affordable and conventional as well as commercial property owners and managers, and developers, investors, and lenders. The Real Estate Associations respectfully urge the Commission to refrain from any regulation of agreements between property owners and broadband providers.

The record in this proceeding demonstrates that all sectors of the multitenant real estate industry – apartment, office, and retail – work diligently and effectively to ensure that their residents and office and retail tenants have access to high-quality, reliable broadband services. Property owners are in the business of meeting resident and tenant demand, and they are well aware of the importance of broadband service. This has been the case for decades and the present market in which property owners and broadband providers operate evolved out of their mutual need to meet those demands. Property owners and providers have developed a set of commercial practices that protect the business interests of both parties while advancing the interests of the subscribers who live, work, and shop in multiple tenant environments ("MTEs").

These Further Comments will broaden and deepen the existing record. The Real Estate Associations will show that existing arrangements in the apartment industry have the following beneficial effects: (i) they offer residents the same prices for service available in the broader

market; (ii) they ensure that the infrastructure inside buildings is regularly upgraded so that residents obtain reliable, high quality service; (iii) they provide residents access to broadband speeds that are often higher than those available in nearby single-family housing; (iv) they establish service level standards enforceable by the owner to ensure that the provider delivers the promised quality of service to residents; and (v) they permit and indeed encourage access to competitive providers. The average respondent to an industry survey reported that 78.5% of apartment properties in their portfolios have access to at least two broadband providers, which exceeds the level of competition reported by the Commission for the United States as a whole.

Standard practices in the office and retail markets also assure tenants of access to high-quality, reliable broadband service that meets their business needs and is delivered by the provider of their choice. In fact, the record shows that even the chief advocates of regulation have no substantive concerns regarding the terms of access to office buildings and retail centers.

Nevertheless, the *2021 Notice* suggests that the Commission may be considering regulations that would have the following direct effects on property owners: (i) mandating that property owners permit broadband providers to use the owner's personal property -- specifically wiring installed at the property owner's expense -- either at no charge or at regulated rates; (ii) mandating that property owners permit broadband providers to install facilities on their real property; (iii) forbidding owners from ensuring high-quality service by limiting use of wire to one provider; (iv) forbidding owners and providers from entering into agreements under which owners provide marketing services to providers in return for negotiated compensation; and (v) requiring disclosure of certain contract terms to apartment residents and office and retail tenants.

The Commission is considering these proposals in response to the baseless claims of a handful of new competitors. These providers assert that the standard terms of lawful, freely

negotiated agreements impede their ability to compete. To date, however, after two rounds of comments and replies, these providers have submitted little in the way of actual evidence.

The Real Estate Associations, on the other hand, have introduced a large volume of detailed and specific factual information, demonstrating that market forces are promoting competition and high-quality, reliable service in MTEs. There are no conditions that would justify any of the proposed regulations. In fact, if the Commission were to proceed, broadband deployment, competition, the quality of service provided to apartment residents and commercial and retail tenants, and the speeds available to them would all suffer.

One needs to look no further than the Covid-19 pandemic to see how committed the rental real estate industry is to providing American renters with superior service. The apartment industry was able to ensure that residents had reliable broadband service, capable of meeting their personal, professional, and educational needs, while at home during the pandemic. The broader commercial real estate industry, both the office and retail sectors, worked tirelessly to ensure American businesses of all kinds had seamless connectivity to serve their customers. The entire real estate industry more than met the demands of the new environment because of the long-term investment made by Real Estate Association members. Adoption of new regulations and imposition of new costs would impede further deployment and additional competition.

The Proposed Rules Would Not Benefit Underserved Properties. The *2021 Notice* suggests that the Commission is considering adopting different rules for "small MTEs" or exempting small buildings from its rules entirely. Such an approach would do nothing to address the issues that underlie this proceeding, for several reasons. First and foremost, there is no recognized or widely agreed-upon definition of what a "small MTE" really is. In the apartment market, depending on the ownership structure of the property, this can mean a duplex, a four-

family home, or even 50+ apartment homes in a garden-style community comprised of several buildings. Second, although size can be a factor in whether a building is underserved, it is not the only factor. The income of residents and the location of the property are also critical. In the case of retail centers and office buildings, the types of businesses occupying the properties and their clientele are important factors. And third, the kinds of agreements to which proponents of regulation object are less common in this underserved market. The critical factor in every decision to serve a property is whether the provider's return on investment calculation is favorable. If that return would be too low, a provider will not agree to upgrade wiring, commit to service level standards, or reimburse any of the owner's wiring expenses. Many such "smaller" properties therefore fall under a very different contractual regime.

Closing the digital divide and expanding deployment and adoption will require collaboration and partnerships between a variety of stakeholders including policymakers, property owners of all kinds, and service providers. The multifamily industry is very much aware of the difficulty of delivering high quality, affordable broadband service to public housing, subsidized housing, senior housing, naturally occurring affordable housing, and lower income housing in general, as well as service in rural areas. But this proceeding originated in the desire of certain competitive providers to lower their costs as they seek to become the third and fourth option in wealthy communities. It is therefore no surprise that the proposals under consideration would do nothing to address deployment where it is actually most needed and could most improve the quality of service for low-income Americans.

Sharing of Wiring Is Harmful to Consumers. In response to the 2017 Petition of the Multifamily Broadband Council and the Notice of Inquiry in this docket, the National Multifamily Housing Council ("NMHC") submitted extensive factual explanations of the

problems that arise with sharing of wiring. These Further Comments supplement that record. Wire sharing harms consumers because when two providers share facilities each has less incentive to maintain the wiring, which leads to deteriorating service quality over time. This is a matter of common sense and basic economics. Furthermore, through a combination of error and outright malfeasance, subscribers suffer from frequent outages, delays when changing providers, generally poor service quality, and other problems. Wire sharing arrangements have proven so troublesome that technical consultants and property owners have learned to avoid them.

For example, E&S Ring, which owns apartment properties in Washington and California, spent approximately $1.3 million dollars to implement a wire sharing mechanism at one of its properties. The company has since been forced to expend considerable additional resources in cash and staff time trying to resolve problems arising from a wiring sharing arrangement at that property. One provider has repeatedly performed unauthorized work on the owner-owned inside wiring and wiring cabinets, which made it more difficult or impossible for the other provider to access the inside wiring. This provider has also caused serious damage to the wiring cabinets that E&S Ring installed to help facilitate the joint use of the inside wiring. As a consequence, residents have experienced service outages and delayed installation and service appointments. These problems began in 2016 and five years later continue.

The Commission's current inside wiring rules provide for the sharing of wiring owned by a cable operator under certain conditions, at the discretion of the property owner. Sharing is not mandatory. Furthermore, the rules do not apply to wiring owned by building owners. The Commission has no jurisdiction over property owners and the authority granted to the Commission under 47 U.S.C. § 544(i) does not extend to wiring they own. Therefore, Congress

has not given the Commission the power to mandate sharing of owner wiring, and any attempt to do so would violate the Takings Clause of the Fifth Amendment.

Exclusive Use of Wiring Is Beneficial to Consumers. Granting one provider the exclusive use of wiring, or allowing a provider to install its own wiring for its own use, avoids the problems that arise from sharing of wiring. Making each provider responsible for maintaining its own facilities helps assure proper maintenance. In addition, when negotiating contract renewals, providers will agree to upgrade existing facilities when needed, thus providing residents receive better service in the present and improvements in technology over time.

Exclusive Marketing Agreements Allow Competition. By their terms, exclusive marketing agreements permit competition. In fact, the record shows that many properties subject to exclusive marketing agreements are served by multiple broadband providers.

Paying Compensation to Owners Benefits Consumers and Providers. Owners receive compensation primarily for two reasons: (1) to offset the investments owners make in infrastructure that benefits providers, and (2) to compensate property owners for marketing services they perform, whether under an exclusive marketing agreement or a nonexclusive marketing agreement. Payment of compensation by incumbents does not harm competitors.

One purpose of compensation is to reimburse owners for costs the provider would otherwise have to bear, but under current industry practice this only recovers a small portion of the owner's actual expenditure. This means that even after reimbursement the owner is still subsidizing the provider. Without compensation, owners would have to choose between bearing the full cost, increasing the size of the subsidy, or simply not allowing another provider to serve the premises. How that decision would turn out would vary from property to property and provider to provider, but on balance it would harm owners, residents and competitive providers.

Compensation paid under an exclusive wiring agreement benefits residents in two ways. First, the exclusive wiring rights motivate the provider to deliver reliable service, as described above. Second, although the amounts in question are small, any increase in an owner's costs provides a disincentive to investment and new apartment construction, leading to lower supply and higher rents in the long term.

Finally, as just noted, compensation paid to owners is not only a small proportion of actual costs paid by them, but small in comparison to rental income, and small in absolute terms. In the *2019 Comments*, we demonstrated that the risk of losing a single resident per year over bad broadband service or a lack of choice outweighs any benefit from the revenue an owner might receive from a provider. In these Further Comments we include an example from an owner representative who reports that in a recent project, the owner's costs for broadband infrastructure have come to $340,750, not including additional future expenses. The owner will receive a one-time "door fee" of $33,400 ($100 per apartment unit) and a later one-time payment of $12,525. A separate annual revenue sharing payment is expected to yield $6,252 per year. If all of those payments are made, it will take 47 years for the owner to recover its initial expenditure. To quote the owner, "telecommunications agreements are not money-makers."

Cost-based Regulation of Compensation Would Not Promote Deployment. The *2021 Notice* suggests that if owners are to be allowed to receive compensation, it should be limited to "actual costs associated with the installation and maintenance of wiring." This formulation is completely inadequate, because those costs are not the only relevant factors. A fair and comprehensive evaluation of the basis for payments to owners would need to account for (i) expenses and other costs arising directly from installation; (ii) all operating costs, including those incurred by the owner to support the provider's presence and maintain the property as an

attractive place for the provider's subscribers to live; and (iii) some share of the initial capital cost of development and construction of the apartment community. The formulation in the *2021 Notice* thus misses the mark completely.

Furthermore, because owners are absorbing substantial costs to subsidize providers, any limitation on payments will force owners to either absorb additional costs, which would be bad for residents, or to think twice about bringing additional providers on to a property. This would be bad for competitive providers, but less so for residents at most properties, because our industry survey found that the average respondent reported that 79% of their apartment properties are already served by at least two providers. Even so, such restrictions would affect wiring upgrades in the future, and thus in the long term would affect service quality. It could also hinder deployment of higher speed service.

Finally, the Commission has no authority to regulate this type of cost. Congress granted the Commission authority to regulate telephone rates and cable television rates – authority that the Commission largely no longer exercises because of the complexity of attempting to oversee those two regulatory regimes. Congress has never provided such authority regarding broadband rates, and it is very difficult to see how the Commission could regulate anything based on a property owner's costs without clear, specific authority from Congress.

Mandatory Access Statutes Do Not Promote Deployment. The *2021 Notice* suggests that the Commission may be considering adopting some form of federal mandatory access regulation, granting a provider access to private buildings. There is no question that the Commission has no such authority from Congress, and any attempt to adopt such a regime would immediately run into the brick wall of the Fifth Amendment and the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982).

Three other points also bear mention. The first is that the existing state statutes require that an eligible provider exercising mandatory access rights must pay for the installation of any wiring. In other words, there is no cost sharing. It is highly unlikely that an owner forced to accept the presence of a provider to whose presence it objects would be willing to underwrite the cost of installation. And yet, providers pursuing mandatory access also complain about having to bear even a portion of the cost of wiring under current law.

Second, if mandatory access rights were extended to all broadband providers, there would be no guarantee of increased deployment, because the competitive broadband providers would continue to have discretion about what properties they serve and would have to bear the cost of installing their own inside wiring. Under current market conditions, competitive providers are granted access to apartment buildings because the provider has made the case for the value of its presence. But there is no corresponding mandatory service obligation. Competitors will still look for cherry-picking opportunities in high-end properties.

Third, current mandatory access laws reduce deployment because a competitive provider never knows when the franchised cable operator or another company with mandatory access rights might choose to enter a building it is serving. A rule granting mandatory access to all providers would force every provider to hedge its bets and pursue only the safest investments.

Finally, extending mandatory access rights is unlikely to increase competition broadly across the rental housing and commercial real estate sectors because so many buildings are already served by two providers. A competitor could obtain access to a building, but according to our survey research, roughly 79% of the time it would then have to pay installation costs and compete with not one but two or more providers. This would only make sense at the top of the market and would do nothing to deliver critically needed broadband service to those who need it.

Transparency Requirements Would Not Benefit Apartment Residents, or Tenants of Office Properties or Retail Centers. Disclosure requirements are a form of compelled speech and therefore may be barred under the First Amendment. Disclosure can only be required of a private entity, such as a property owner or broadband provider, if the Commission is able to identify a substantial interest that would be advanced by the particular disclosure required. In this case, however, informing residents that the property owner receives certain payments would be of no benefit to those residents. Disclosure would not affect their service quality, their service choices, or their rates. Consequently, disclosure requirements would not benefit apartment residents, while violating the First Amendment rights of property owners.

The Commission Lacks the Legal Authority To Adopt the Proposed Measures. Even if the Commission were to reassert authority over broadband service in a future proceeding, its power to adopt any of the proposed measures would be severely limited. None of the statutes discussed in the record to date extend the Commission's jurisdiction to include owners of real property. In addition, the various proposals raise significant issues under the Fifth Amendment and the First Amendment. The Commission cannot mandate access to private buildings or require them to make their wiring available to third parties. Nor can the Commission regulate the terms of marketing agreements or impose disclosure requirements without violating the First Amendment commercial speech rights of both owners and providers.

* * *

For all the foregoing reasons, the Commission should refrain from adopting any further regulation affecting broadband deployment in the MTE market.

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142

FURTHER JOINT COMMENTS OF THE NATIONAL MULTIFAMILY HOUSING COUNCIL, THE NATIONAL APARTMENT ASSOCIATION, THE COUNCIL FOR AFFORDABLE AND RURAL HOUSING, ICSC, THE INSTITUTE OF REAL ESTATE MANAGEMENT, NAREIT, THE NATIONAL LEASED HOUSING ASSOCIATION, AND THE REAL ESTATE ROUNDTABLE (the "Real Estate Associations")

Introduction

The National Multifamily Housing Council, the National Apartment Association, the Council for Affordable and Rural Housing, ICSC, the Institute of Real Estate Management, Nareit, the National Leased Housing Association, and The Real Estate Roundtable respectfully submit these Further Comments in response to the Commission's Public Notice dated September 7, 2021 (the "*2021 Notice*").[1] The Real Estate Associations represent a broad array of real estate industry sectors, including for-profit and non-profit owners, operators, developers of rental residential properties, both affordable and conventional as well as commercial property owners and managers, and developers, investors, and lenders.[2] We respectfully request that the

[1] *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Public Notice (rel. Sep. 7, 2021).

[2] The individual associations are further described in Exhibit A.

Commission terminate this proceeding without further action because apartment residents have ample access to competitive broadband service and the types of agreements under review promote the deployment of high quality broadband service at prevailing market rates. In addition, the concerns raised in the *2021 Notice* simply do not apply to the commercial and retail real estate markets.[3]

The apartment industry is dedicated to serving the public by offering a range of attractive, safe, and affordable living options in every community. The industry is highly competitive because Americans have many choices when looking for housing.[4] And because apartment residents are highly mobile, with almost half (46.9%) of them moving every year, [5] limiting resident turnover is a major concern for property managers. This means, as the Real Estate Associations discussed at length in 2019,[6] that apartment owners work very hard to stay in touch with the services and features current and potential residents are looking for and work even

---

[3] Joint Comments of the National Multifamily Housing Council, the National Apartment Association, ICSC, the Institute of Real Estate Management, Nareit, the National Real Estate Investors Association, and the Real Estate Roundtable, GN Docket No. 17-142 (filed August 30, 2019) (*"2019 Comments"*) at 63-64; Joint Reply Comments of the National Multifamily Housing Council, the National Apartment Association, ICSC, the Institute of Real Estate Management, Nareit, the National Real Estate Investors Association, and the Real Estate Roundtable, GN Docket No. 17-142 (filed September 30, 2019) (*"2019 Reply"*) at 20-22.

[4] The real estate industry as whole is highly competitive, with thousands of companies of all sizes seeking to attract and retain residents and commercial tenants. Indeed, the Federal Trade Commission has ruled that the real estate industry is exempt from pre-merger antitrust review precisely because it is so competitive. *Premerger Notification, Reporting and Waiting Period Requirements*, 61 Fed. Reg. 13666, 13674 (Mar. 28, 1996) (finding no single entity is likely to have enough market concentration to trigger antitrust concerns).

[5] National Apartment Association, Survey of Operating Expenses and Income in Rental Apartment Communities (2021), https://www.naahq.org/news-publications/2021-income-and-expenses-survey, (last visited Oct. 18, 2021).

[6] *2019 Comments* at 2-13.

harder to provide them. High quality, reliable broadband service has been at the top of the list for apartment residents for years and the apartment industry has an exceptional track record in anticipating and meeting resident needs for broadband and related technology services.

In the commercial market, owners of office buildings and retail properties have been equally committed to ensuring that tenants have reliable access to the broadband services they need for the same reasons.[7] They are in the business of satisfying tenants, and tenants have many choices when looking for office or retail space.

The Covid-19 pandemic has been a true stress test for the entire U.S. economy. We all know the many ways in which the pandemic has transformed how Americans use broadband services in their personal lives and at work. The apartment industry was able to ensure that residents had reliable broadband service, capable of meeting their personal, professional, and educational needs while at home during the pandemic. The broader commercial real estate industry, both the office and retail sectors, worked tirelessly to ensure American businesses of all kinds had seamless connectivity to serve their customers. The entire real estate industry more than met the demands of the new environment because of the work the members of the Real Estate Associations have been doing for the past two decades. Reliable, high speed broadband service was already ubiquitous across all of types of real estate, in place and ready to meet the new challenges created by the pandemic. The broadband industry itself could not have performed as well as it did without the long-standing commitment of the entire real estate community to ensuring that residents and tenants of all kinds had access to the communications services they need.

---

[7] *2019 Comments* at 13-14.

Indeed, the relationship between property owners and broadband providers is symbiotic. Both industries need each other to succeed. Broadband companies deliver a vital service. Real estate owners develop and manage vast, dense, highly profitable markets for the efficient delivery of that service. This mutually beneficial relationship has been working well without government regulation, primarily because the participants in the market have understood that if they work together to understand each other needs and priorities both sides will benefit and the sharing of mutual success will promote further cooperation.

In 2019, after the most recent round of comments in this proceeding had been filed, it was clear that the kinds of regulations that have been under consideration were not necessary. There was then no significant evidence of a problem in the broadband market in multiple tenant environments. The experience of the last two years confirms this. The transitions that flowed from the need to adapt to the pandemic happened seamlessly, in the current legal environment. That environment was and is largely unregulated because, as we discussed at length in the *2019 Comments* and will review in these Further Comments, the standard types of agreements between property owners and broadband providers and their key provisions fall outside the scope of the Commission's rules. This is in keeping with the highly successful, light touch approach that the Commission has taken so far toward broadband service and broadband providers.

In fact, the typical apartment community has at least two broadband vendors available to residents, in markets where such competition exists.[8] In 2019, the Real Estate Associations

[8] Declaration of AMLI Management Company, attached as Exhibit B ("2021 AMLI Decl."), at ¶ 5; Declaration of AvalonBay Communities, Inc., attached as Exhibit C ("2021 AvalonBay Decl."), at ¶ 16; Declaration of Jeffrey Kok, attached as Exhibit D ("Kok Decl."), at ¶¶ 5-7; Declaration of Andrew Smith, attached as Exhibit E ("2021 A. Smith Decl."), at ¶¶ 7-9; Declaration of Kimberly Smith, attached as Exhibit F ("2021 K. Smith Decl."), at ¶¶ 6-9; Declaration of Linda Wu, attached as Exhibit G ("Wu Decl."), at ¶ 6.

introduced detailed and extensive evidence from survey research and other sources showing that residents of roughly three-quarters of apartment buildings could choose between at least two broadband providers.[9] Today, as we discuss in Part II, that figure has increased somewhat: a national survey of apartment owners and managers conducted by NMHC and NAA has found that 79% of apartment properties in the average respondent's portfolio had access to at least two broadband providers.[10] These vendors typically include the local cable multiple system operator ("MSO"), the incumbent local exchange carrier ("ILEC") broadband product, and often one or more fixed wireless or fiber broadband providers.[11] Many apartment communities have more than three broadband vendors available.[12] Furthermore, under the terms of existing agreements with providers, apartment owners have been able to assure residents of very high broadband speeds.[13] In the commercial market, property owners routinely grant access to competitive

---

[9] *2019 Comments* at 9-13, 64-67.

[10] The National Multifamily Housing Council and the National Apartment Association conducted a joint online survey of their members, titled "2021 Apartment Industry Survey on Broadband Choice, Competition, and Infrastructure" ("*NMHC/NAA 2021 Broadband Survey*"). Multifamily firms responded to the survey conducted in late September/early October. These firms collectively own 978,963 units and manage 770,640 units. Respondents were asked a broad range of questions regarding the terms of contracts between apartment owners and broadband providers, the level of competition in apartment communities, the kinds of costs incurred by apartment owners in connection with installation of broadband facilities under those agreements, and the benefits and drawbacks of different arrangements with broadband providers. Respondents represented all geographic areas of the United States and a wide variety of portfolio sizes. The average respondent (or firm in the survey) indicated that apartment residents have choice in 79% of its portfolio's properties.

[11] *2019 Comments* at 11-12.

[12] *See, e.g.,* Kok Decl. at ¶ 6 (20% of Mill Creek's properties have three or more broadband providers on site); 2021 K. Smith Decl. at ¶ 10 (16% of GID/Windsor's properties have three or more providers); Wu Decl. at ¶ 6 (36% of properties have three or more providers); *2019 Comments* at 12.

[13] See Part II(C) below.

providers when requested by a tenant. There is no dearth of competitive choices in office buildings, shopping centers, or other commercial buildings.

The Real Estate Associations also urge the Commission to bear in mind the complexity of real estate development and the highly regulated nature of the real estate industry. At the federal level alone, myriad agencies and regulators are involved in everything from the development, operation, and financing of real estate projects because of their critical importance to housing Americans and contributing to the economy.

For example, many of the members of the Real Estate Associations face regulatory oversight and compliance requirements from a number of Federal agencies with jurisdiction over the housing market. These include the Department of Housing and Urban Development (HUD), the Federal Housing Finance Agency (FHFA)/Government Sponsored Entities (GSEs), the Department of Agriculture (USDA), and federal banking regulators. The Commission should proceed cautiously to avoid disrupting the work of its federal partners, which is essential to capital formation, investment, financing, and the development of real estate that is fundamental to our communities and our overall economy.

This is particularly important in light of the nation's housing affordability challenges. Some of the proposals being considered by the Commission would raise additional barriers to the development and operation of rental housing. The collective impact of similar barriers is already insurmountable in many markets; research shows that, on average, regulations comprise 32 percent of total development costs.[14] Increased regulation ultimately results in renter households

[14] National Association of Home Builders and National Multifamily Housing Council, REGULATION: OVER 30 PERCENT OF THE COST OF A MULTIFAMILY DEVELOPMENT (June 2018), https://www.nmhc.org/contentassets/60365effa073432a8a168619e0f30895/nmhc-nahb-cost-of-regulations.pdf, (last visited Oct. 19, 2021).

absorbing undue costs, including those families in a community least able to afford any additional burden.

In addition, despite the industry's success in ensuring that residents and commercial tenants have had access to broadband services, the pandemic and other economic developments have placed additional hurdles in the path of property owners. Overcoming these hurdles can significantly affect residents and tenants. For example, in a declaration supporting the *2019 Comments*, Continental Properties, an apartment developer serving middle income Americans, described its development process and stated that the cost of a new apartment development in the middle of the country could range from $35 million to nearly $50 million per project.[15] Today, however, those costs have gone up substantially – ranging from $49,750,000 to $75,000,000 for a comparable project. The reasons for this increase include higher local government fees and additional regulatory requirements; higher land prices; supply chain issues; material cost volatility; and construction labor shortages.[16] Despite these increases, Continental continues to pay essentially all of the cost of installing broadband infrastructure in its properties, as well as the necessary electrical connections and recurring electrical utility costs.[17]

This example from Continental illustrates one aspect of the symbiotic relationship referred to earlier. The record shows that apartment owners routinely assume responsibility for a substantial share of the cost of infrastructure used by broadband providers. The market is working because property owners place such a high priority on ensuring access to superior broadband services that they are often willing to subsidize service in this fashion.

---

[15] *2019 Comments*, Exhibit B, Declaration of Kimberly Grimm ("2019 Grimm Decl.") at ¶ 6.

[16] Declaration of Kimberly Grimm, attached as Exhibit H ("2021 Grimm Decl."), at ¶ 7.

[17] 2021 Grimm Decl. at ¶¶ 7-10.

Finally, as the country works to address the digital divide we also need to consider that there are places where service is severely limited – most frequently in underserved areas where providers have not invested in broadband expansion. Lower income communities and rural areas in particular have trouble attracting both competition and high-speed, high-quality service. Multifamily firms involved in the development and operation of affordable, rural, or low-income properties want to fully and fairly meet the needs of that market, but finding service providers who are willing to serve such properties can be an enormous challenge. Despite the best efforts of owners, residents of these properties are often left with limited service options and limited speed. We cannot emphasize strongly enough that the terms of building access are not the problem here and regulation of the kind proposed in this proceeding will not solve the actual problem. The solution will come from broadband providers that are willing and able to reach underserved sectors of the market rather than merely grabbing the low-hanging fruit in more profitable communities.

The Real Estate Associations submitted the *2019 Comments* and *2019 Reply* in response to the Notice of Proposed Rulemaking released July 12, 2019.[18] In addition, the National Multifamily Housing Council ("NMHC") submitted relevant comments and reply comments in response to (i) the Notice of Inquiry in this docket[19] (the "*2017 NOI Comments*" and "*2017 NOI Reply*," respectively) and (ii) the Public Notice seeking comment on the Multifamily Broadband

[18] *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Proposed Rulemaking, 34 FCC Rcd 5702 (2019) (the "*NPRM"*).

[19] *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, 32 FCC Rcd 5383 (2017) (the "*2017 NOI*").

Council Petition for Preemption[20] (the "*MBC Petition Comments*" and "*MBC Petition Reply*," respectively). The facts, circumstances, and arguments addressed in the foregoing submissions are all directly relevant to the questions posed in the *2021 Notice* and consistent with the position of the Real Estate Associations in these comments.[21]

In response to the Commission's request to refresh the record, the Real Estate Associations have also gathered new information. In addition to the *NMHC/NAA 2021 Broadband Survey* cited above, we contacted property owners and industry experts, including many who participated in 2019 and several new ones, and asked them to submit declarations describing their experience with matters relevant to the questions proposed in the *2021 Notice*.

I. THERE HAVE BEEN NO SIGNIFICANT CHANGES IN THE TERMS OF AGREEMENTS BETWEEN BUILDING OWNERS AND BROADBAND PROVIDERS SINCE COMMENTS WERE FILED IN 2019.

Despite the broad and deep effects of the pandemic on the U.S. economy, the basic relationship between broadband providers and apartment owners has not changed in the two years since 2019. Consequently, the terms of the types of agreements under review in the *2021 Notice* are no different than those that existed when the Commission released the *NPRM* and the *NOI*. Exclusive wiring agreements, exclusive marketing agreements, and payment of

---

[20] *Media Bureau Seeks Comment on Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No 17-91, Public Notice, DA 17-318 (rel. Apr. 4, 2017) (the "*MBC Petition*").

[21] The *MBC Petition Comments* were extensively cited in the *2017 NOI Comments*. The *MBC Petition Comments* are particularly relevant at this point because they discussed in detail issues related to sharing of wiring and were supported by several declarations that bear directly on questions asked by the *2021 Notice*. The Real Estate Associations therefore respectfully request that the *MBC Petition Comments* and *MBC Petition Reply* be incorporated into the record in this docket.

compensation by providers were then and remain today valuable tools, and they function in the same way they have for many years.

All of the information and arguments in the filings of the Real Estate Associations in 2019 and the NMHC in 2017 remain accurate for purposes of the questions posed in the *2021 Notice*, unless otherwise noted. The discussion that follows addresses the specific questions raised by the *2021 Notice* but also builds on past submissions. The evidence as a whole is clear: There is no need for new regulation of agreements between property owners and broadband providers. Current practices allow the parties in individual transactions to allocate between themselves responsibility for specific tasks and agree on fair compensation. We know that those practices do not impede competition because the average firm in the *NMHC/NAA 2021 Broadband Survey* indicated that apartment residents have a choice of at least two providers in 79% of its portfolio's properties, and a substantial proportion host three or more. On the other hand, in many parts of the country, single-family residents still have only one choice. The limiting factor is not the needs or demands of owners, but the ability and willingness of providers to serve, which is why low-income and affordable housing suffer from poor quality service and a lack of competition. The measures under consideration in this proceeding would do nothing to address that problem.

II. REGULATION OF THE MULTI-TENANT MARKET IS NOT NEEDED BECAUSE, AS THE REAL ESTATE ASSOCIATIONS DEMONSTRATED IN 2019, THERE IS ALREADY AMPLE BROADBAND COMPETITION INSIDE BUILDINGS.

A. The Level of Competition Available to Apartment Residents Is Equal to or Better Than the Level in the Single-Family Market.

The Real Estate Associations have demonstrated that, as of 2019, 76% of apartment buildings were served by at least two wireline broadband providers, and roughly 80-90% of new

apartment communities open with at least two providers.[22] The *2019 Comments* also established that a large proportion of those communities were subject to exclusive wiring agreements, exclusive marketing agreements, or both.[23] Non-exclusive marketing arrangements were also common.[24] Furthermore, roughly two-thirds of properties with cash compensation agreements in place had more than one broadband provider on site.[25]

In conducting the *NMHC/NAA 2021 Broadband Survey*, the Real Estate Associations asked a range of questions regarding the types of agreements apartment owners enter into with providers and the terms of those agreements. The average survey respondent reported that 79% of its properties have access to at least two broadband providers.' In addition, respondents reported that the proportion of properties with cash compensation agreements in place that have more than one broadband provider on site is essentially unchanged, at 65%. We did not obtain new information regarding trends in new construction, but have no reason to believe that the already high number noted above has changed.

In contrast, according to the most recent information published by the Commission, 73.8% of Americans now have access to at least two fixed terrestrial broadband providers offering speeds of at least 25/3 Mbps.[26] This suggests that the apartment market offers more competition for broadband service than exists in the nation as a whole; in any event, the Real Estate Associations have three observations regarding methodology used in this report.

---

[22] *2019 Comments* at 66.

[23] *Id.* at 67.

[24] *Id.*

[25] *Id.*

[26] *In the Matter of Communications Marketplace Report*, GN Docket No. 20-188, 2020 Communications Marketplace Report, 36 FCC Rcd 2945, 3031, ¶¶ 126, 127 (2020) (*"2020 Communications Marketplace Report"*).

Our first observation is that it includes fixed wireless service. As far as we know, the fixed wireless providers are not directing their efforts towards single family residents, especially in suburban markets. While fixed wireless offers rural America the promise of good quality, cost-effective broadband service, it is our understanding that in urban and suburban markets their efforts are concentrated on the multifamily market. This is important because single family residents in the suburbs and urban cores typically have one or two choices for effective broadband service: the cable MSO and the ILEC. Consequently, although the fixed wireless operators may be technically capable of serving single family residents in those areas, it is not clear that they are actually marketing their services to them in significant numbers or able to serve them in significant numbers any time in the foreseeable future. Similarly, competitive fiber broadband providers have a limited scope and focus. This is not to criticize the efforts of those companies, but only to emphasize that the Commission's figure of 74% very likely overstates the actual level of competition.

Our second observation is that the Commission itself has acknowledged that the Form 477 data collection process is less accurate than one might desire. In the *2018 Consolidated Market Report*, the Commission stated that "it is not necessarily the case that every household, housing unit, or person will have coverage of a service in a census block that this analysis indicates is served."[27] In its most recent report, the Commission confirms that this is still the

---

[27] *In the Matter of Communications Marketplace Report, The State of Mobile Wireless Competition Status of Competition in the Market for the Delivery of Video Programming, Status of Competition in the Marketplace for Delivery of Audio Programming, Satellite Communications Services for the Communications Marketplace Report*, GN Docket No. 18-231, WT Docket No. 18-203, MB Docket No. 17-214, MB Docket No. 18-227, IB Docket No. 18-251, Report, 33 FCC Rcd 12558, 12655 (2018) ("*2018 Consolidated Market Report*"), at ¶ 184 (footnotes omitted). This report also states that "coverage estimates represent deployment of networks to consumers and do not indicate the extent to which service providers affirmatively

case: "a census block is classified as served if the FCC Form 477 deployment data indicate that service can be provided to some, even if not all, locations in the census block."[28] In other words, the 74% figure from the Commission's *2020 Communications Marketplace Report* inherently overstates actual broadband coverage. It is impossible to say by how much, but in many census blocks the overstatement could be considerable.

Our third observation is that the 74% figure applies only to 25/3 Mbps service. As we discuss below in Part II(C), many owners are able to guarantee residents much higher speeds through the agreements they negotiate with broadband providers. In fact, the gold standard in the apartment community today is 1 Gbps or better, and many owners either already offer that level of service in a high proportion of their communities, or are actively working to meet that standard. In the overall market, however, the Commission reports that only 35.2% of the population have two options for 250/25 Mbps service and the *2020 Communications Marketplace Report* does not include information for speeds above that level.[29]

Unfortunately, due to the short time available to design and conduct the *NMHC/NAA 2021 Broadband Survey* and the complexity of the information requested, we were unable to collect reliable speed data in the survey. Nevertheless, the high speeds discussed in Part II(C) represent the standard in the marketplace and we believe that, on average, Americans living in apartment buildings are more likely to have access to multiple providers, at higher speeds, than residents of single-family communities. For this reason alone, the Real Estate Associations feel very strongly that any regulation along the lines of what has been proposed in this proceeding

---

offer service to residents in the covered areas. Further this analysis likely overstates the coverage experienced by some consumers . . . ." *Id.* at ¶ 184, n. 590.

[28] *2020 Communications Marketplace Report* at ¶ 86.

[29] *2020 Communications Marketplace Report* at ¶ 126.

would be inappropriate. Market forces are clearly providing high-speed, high quality, competitive broadband without government intervention. For example, Essex Property Trust, Inc., the twelfth largest apartment owner and 24th largest manager in the country, reports that since 2019 the number of properties in its portfolio offering three or more broadband providers has increased from 7% to 36% of the portfolio. This has been done largely by working with competitive providers, such as WaveG, Consolidated Smart Systems, Starry. Gigstreem, BAI Connect, and Willoweb. In fact, Essex has entered into contracts with such providers for 68% of its portfolio.[30]

There is no applicable legal standard or policy goal that would justify imposing new cost and regulatory burdens on apartment owners when broadband providers are delivering lower levels of service and competition in the single-family, lower-income, and smaller multifamily markets.

B. Existing Agreements Guarantee Apartment Residents the Same Prices Available in the General Market.

The *2021 Notice* asks at various points about the effects of different types of agreements on the prices apartment residents pay for broadband service. The answer in every case is that the agreements in question have no effect on what residents pay. Providers market their services throughout a community and do not have separate rate cards for single family and multifamily housing nor do they make any other distinctions. All residential customers pay the same rate.[31]

---

[30] Wu Decl. at ¶¶ 7-8.

[31] Residents will pay less if a multifamily community is subject to a bulk service agreement, but this is the only exception.

C. Existing Agreements Often Guarantee Apartment Residents Higher Speeds and Better Service Quality than Is Available to Single Family Residents.

One of the benefits of exclusive wiring agreements is that an owner can negotiate service level standards that are more detailed and stringent than the provider would otherwise be required to meet. Owners can also negotiate for faster broadband speeds, including speeds that far exceed the Commission's minimum of 25mbps/3mps.[32] The following table illustrates what owners are able to deliver for their residents:

Speed	Percent of Portfolio		
	AvalonBay[33]	Continental[34]	Mill Creek[35]
Up to 10/1Mbps	0	0	0
Up to 25/3 Mbps	0	0	0
Up to 50/5 Mbps	0.4	0	0
Up to 100/10 Mbps	0	0	0
Up to 250/25 Mbps	0	5	0
Up to 500/25 Mbps	0.2	0	0
Up to 1 Gbps/35 Mbps	50.0	0	0
More than 1 Gbps	49.0	95	100
TOTAL	100.0	100	100

The Real Estate Associations wish to emphasize that the data in this table represents a cross-section of the national market. Continental Properties develops garden-style suburban communities serving middle income Americans. AvalonBay's portfolio consists largely of mid-

[32] 2021 AvalonBay Decl. at ¶ 18; 2021 Grimm Decl. at ¶ 18; Kok Decl. at ¶ 7; Declaration of Greg McDonald, attached as Exhibit I ("McDonald Decl."), at ¶ 7. *See also 2019 Comments*, Exhibit J, Declaration of Equity Residential ("2019 Equity Residential Decl.") at ¶¶ 5, 6, 21; *2019 Comments*, Exhibit I, Declaration of Lisa Yeh ("2019 Yeh Decl.") at ¶24.

[33] 2021 AvalonBay Decl. at ¶ 18. Represents proportion of 85,749 units.

[34] 2021 Grimm Decl. at ¶ 18. Represents proportion of 63 properties.

[35] Kok Decl. at ¶ 7. Represents proportion of both 75 properties and 14,267 units.

rise and high-rise buildings in urban areas. Mill Creek Residential Trust ("Mill Creek") operates high quality residential communities in selected urban markets. All three are offering very high speeds – mostly 1 Gbps or better -- in essentially all of their properties because that is what apartment residents are coming to expect.

Furthermore, if a provider doesn't meet the standards, or if residents have other complaints about their service, the property owner is able to intercede on their behalf. Consequently, service quality is often better in properties that are subject to such agreements.[36] If there is no agreement, or if the owner's authority to negotiate is reduced, the residents will not get the benefit of such service quality guarantees.

Owners of certain properties are therefore in a unique position, because they have both the incentive to push for better speed and service terms and the bargaining power to get them. The properties in this position are those that through a combination of location, size, and resident demographics are especially attractive to broadband providers.

The limiting factor, however, is always whether the provider is willing to serve a property. A provider may be able to serve a property, yet not be willing. Or it may be able and willing, but only on terms favorable to itself. One way to look at this is that real estate is fixed and immobile – an owner must wait for a provider to extend its facilities to reach a property. On the other hand, even a wireline provider is by comparison mobile and has many options – there are after all, over 23 million occupied apartment units and 5.9 million commercial buildings of

[36] 2021 Grimm Decl. at ¶¶ 13-18; 2021 AvalonBay Decl. at ¶¶ 17, 18; McDonald Decl. at ¶¶ 4-7.

all types in the United States.[37] Faced with a choice over where to deploy its limited construction capital, a provider will understandably look for the most profitable opportunities.

In fact, 55% of survey respondents reported that they had requested service from a provider and been turned down at least once. The top two reasons given by providers were "lack of distribution infrastructure near the property" (88%) and "project would not meet internal return on investment criteria" (56%). Respondents were also asked if they had ever requested that infrastructure at a property that was already served by a provider be upgraded; 38% said they had been turned down. In that case, the top two reasons were the same, but reversed: inadequate investment return was the most common reason (70%) and lack of infrastructure was the second (40%).

On the other hand, in smaller properties, or those serving lower income residents, the owner typically has little bargaining power, if any. Sometimes an owner is able to negotiate a portfolio-wide arrangement, in which the provider agrees to extend better service terms to properties it might not otherwise be willing to serve, in return for access to properties that will generate a higher return on its investment. But if such a broader arrangement is not an option, the kinds of agreements under review in this proceeding are also not likely to be on the table. The reality is that broadband providers are allowed to refuse service to properties for any number of reasons. For example, one industry consultant reports that he recently contacted a cable MSO about deploying broadband service to a manufactured home community in Maryland where the resident were dissatisfied with speeds offered by the incumbent, a small private operator. The

---

[37] NMHC Quick Facts Data Download, Occupied Apartment Stock, https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-data-download/, (last visited Oct. 18, 2021); Commercial Buildings Factsheet, Center for Sustainable Systems, University of Michigan, https://css.umich.edu/factsheets/commercial-buildings-factsheet, (last visited Oct. 18, 2019).

large cable company refused because it would cost too much to deploy its facilities.[38] Another consultant reports that all types of providers will refuse to serve certain buildings, typically those under 150 units or properties with lower income residents. Even if a property is already being served, when a contract expires providers will present "take it or leave it" offers and refuse to upgrade facilities to deliver better speeds.[39] Furthermore, it is also difficult to find competitors willing to serve these properties.[40] The types of contracts under review in this proceeding are simply not a factor in these situations.

For all these reasons, the terms of the agreements under consideration in this docket do not harm and often improve the quality of service available to broadband subscribers.

D. It Is Clear from the Responses to the NPRM in 2019 that Access to Commercial Buildings and Retail Properties Is Not a Concern.

In the *2019 Reply*, the Real Estate Associations analyzed the comments of other parties with respect to competition in commercial buildings. We concluded then that access to commercial buildings and retail properties is not a significant concern, noting that Common Networks, Inc., FBA, INCOMPAS, Starry, Inc., and WISPA had all focused entirely on residential service.[41] CenturyLink was the only party that raised any specific concerns about access to commercial property, citing a handful of instances in which that company was unable to obtain access to certain shopping centers. As discussed in the *2019 Reply*[42] and in a

---

[38] 2021 Smith Decl. at ¶10.

[39] McDonald Decl. at ¶¶ 14-17.

[40] *Id.* at ¶17.

[41] *2019 Reply* at 20-21.

[42] *2019 Reply* at 22-22.

subsequent *ex parte* notice,[43] those incidents occurred because CenturyLink representatives had contacted the incorrect individuals; once proper communications were established, CenturyLink obtained access.

The Real Estate Associations wish to emphasize that the management of any real estate asset is a complex matter. Digging trenches, drilling through walls and roofing, making electrical connections, and many other activities can all cause enormous physical damage and financial loss if not coordinated and performed properly. This is why property owners insist on entering into agreements with providers in advance of any work being done.

On the other hand, denying a commercial or retail tenant access to the provider of its choice is a losing proposition. For example, many retail tenants have national agreements with specific broadband providers. Shopping center owners would gain nothing if they attempted to interfere with those relationships.

Nothing has changed in the intervening two years. Consequently, the Commission need not consider those issues any further.

E. We Again Urge the Commission to Require Providers To Report the Number and Types of Agreements They Have Entered Into with Owners of Residential Buildings.

In the *2019 Comments*, the Real Estate Associations urged the Commission to require broadband providers to report on the number and types of agreement they have entered into with property owners.[44] Such a report would give the Commission the information necessary to accurately assess the questions raised in this docket, without relying on anecdotal reports from

---

[43] Letter from Samuel L. Feder, Jenner & Block, LLP, on behalf of International Council of Shopping Centers, GN Docket No. 17-142 (filed Jan. 27, 2020).

[44] *2019 Comments* at 56.

providers. It would also eliminate the risk of relying on flawed anecdotal evidence. We again respectfully request that the Commission conduct such a survey.

In addition, we now propose that the Commission include in such a report (i) the broadband speeds required to be provided under each agreement; and (ii) the demographic characteristics of all buildings served, to include particularly affordable housing, public housing, and lower income communities.

III. ATTEMPTING TO REQUIRE SHARING OF WIRING WOULD HARM CONSUMERS AND EXCEED THE COMMISSION'S AUTHORITY.

The *2021 Notice* asks whether there are benefits or drawbacks to shared access to wiring and other facilities in apartment communities, and whether such sharing promotes competitive entry and tenant choice. The answer is that while sharing of wiring and other facilities is attractive in theory, decades of experience have shown that in practice such arrangements are very difficult to manage and maintain successfully. Furthermore, the Commission has no statutory authority to impose on providers any obligation to share facilities inside buildings, and no authority to prevent property owners from installing wiring or conduit on their own property or to require them to make such facilities available to providers on any particular terms.

A. Sharing of Wiring Has Proven to Be Impractical and Harmful To Service Quality.

In the *2019 Comments*, we explained why the cable MSOs negotiate for exclusive rights to use wiring and how the ILECs are able to reach the same result by retaining ownership of wiring they install.[45] Setting aside the historical reasons for that development, both forms of exclusive wiring agreement offer important practical benefits, the first being that the entity that is

[45] *2019 Comments* at 38-39.

using the wiring has a clear incentive and obligation to maintain it. Shared resources tend not to be maintained properly; this phenomenon is well-known in economics as "the tragedy of the commons."

Sharing of wiring in any form is undesirable because it creates conflicts between providers, management problems for both owners and providers, and disincentives to further deployment.[46] The Commission already has a wiring sharing mechanism in place, in the form of the Part 76 rules; those rules permit wire sharing but do not require it. As attractive as it may appear to new competitors who are trying to reduce their construction costs, however, sharing of wiring is not a practical solution.

There are two problems. One is simply that the additional complexity introduced when providers are either using the same facilities at the same time[47] or are disconnecting and reconnecting home run wiring as subscribers change providers,[48] simply increases the likelihood of signal interference or inadvertent error. The second and more fundamental problem is that the entities sharing the wiring are competitors, which makes them disinclined to cooperate. When they fail to cooperate, the residents and the property owner suffer the consequences. The

---

[46] In its ruling on the *MBC Petition,* the Commission preempted Article 52 of the San Francisco Police Code as it applies to "in-use" wiring. 34 FCC Rcd 5702, 5724-5759 (2019) ("*MBC Ruling*"). The *MBC Ruling* distinguished between "in-use" wiring and wiring that is not in use, defining "in-use" as "home run or cable home wiring currently being used by a communications service provider to deliver service." *MBC Ruling*, 34 FCC Rcd at 5727, n. 172. That distinction notwithstanding, the *MBC Ruling* accurately identified many of the problems with sharing of wiring, noting "much of our policy analysis below applies without regard to whether the facility at issue is in use." *MBC Ruling,* 34 FCC Rcd at 5725. There are ample policy reasons not to adopt any kind of mandatory sharing requirement and the *MBC Ruling* is a good guide on that issue.

[47] This is one of the key problems with sharing of "in-use" wiring identified in the *MBC Ruling*.

[48] This is the process contemplated by 47 C.F.R. § 76.804(b).

residents experience poor service quality, while the owner has the dual problem of satisfying frustrated residents and overseeing recalcitrant providers.

This is not to say that shared wiring arrangements can never work – but they are expensive and complicated to implement effectively and when problems arise those problems are very consequential and difficult to resolve. In fact, wire sharing arrangements have proven so troublesome that simply as a matter of best practices technical consultants and property owners have learned to avoid them. The declarations supporting the Real Estate Associations' *2019 Comments* and the NMHC's *2017 NOI Comments* and *MBC Petition Comments* offered numerous examples of the problems created by attempts to share wiring.

The late Richard Holtz was the President and CEO of InfiniSys, Inc., a leading low voltage design and technology consulting firm serving the multifamily industry. Mr. Holtz was highly regarded in the multifamily community and recognized as a leading industry expert. In 2017, he submitted a declaration supporting the *MBC Petition Comments*, which included the following discussion of the problems with sharing of wiring:[49]

> In low voltage designs for properties that will be served by multiple providers on a subscription basis (i.e., not on a bulk basis), we currently recommend that multifamily property ("MDU") owners install a separate pathway (e.g., a 12mm microduct) for each provider from the intermediate distribution frame ("IDF") to the structured wiring panel in each residential unit. These pathways are intended for placement of fiber to the unit, which has become a de facto standard for properties opening in 2018 or later. We never recommend allowing more than one provider to use the same home run fiber, as it is very rare for two providers to have compatible electronic systems.
>
> Allowing more than one provider to access the same home run, at different times, of unshielded twisted pair (e.g., Cat 5, Se, or 6) data cabling ("UTP") or coaxial video cabling poses a number of technical and practical challenges. We would never recommend this, unless proper physical cross-connect fields are placed at every IDF and the main distribution frame ("MDF") and unit distribution panel ("UDP") with labeling complying with the industry standard, TIA-606B. When multiple providers are allowed to use the same home run cable, rather than using dedicated home runs, the following potential challenges may occur over

[49] *MBC Petition Comments*, Exhibit B, Declaration of Richard Holtz, ¶¶ 3-7.

time:

a. Maintaining proper labeling can be difficult. Labeling must have necessary documentation posted in each MDF, IDF, and UDP. Without proper labeling, residents are more likely to experience service disruptions through mistaken disconnects of home runs serving their units.
b. A log of any changes must be kept physically at the property.
c. Cable must be long enough to be used without splicing. Splicing is not allowed under the TIA standards; if done, splicing will result in interference, signal leakage, or diminished transmission speed, resulting in loss of service quality to residents.
d. Connector incompatibilities may occur between multiple providers. If so, providers may cut the cable and attach a compatible connector. Even if the cable is terminated properly, it will grow shorter every time this is done, until it can no longer be used without splicing. (See [c], above.) This will require replacement of the entire home run, which entails considerable expense and disruption (including cutting sheetrock, coordinating access to the resident's unit for work, etc.).
e. Limitations on, or the configuration of, space in the IDF room can make it difficult or impossible to allow additional providers to reach entry points, so that they can connect to the necessary home run cable. Further, there are physical separation requirements between high and low voltage systems (i.e., NEC 800.50 and TIA-569D), which means that only so many electronics can be placed within rooms that share electric and communications systems, as demonstrated on many older properties. And,
f. Because most MSOs and ILECs use a single cable to carry voice, video, and data signals, another provider that performs a cross-connect to deliver a requested service to a resident may cause an unwanted disconnect of other services that the same resident was receiving.

Proper physical cross-connect fields are essential if multiple providers are to be given the right to use the same UTP or coax home run. However, in our experience with multifamily properties across the country, we find that it is very rare, indeed, for an MDU to have such cross-connect facilities in the IDFs and MDFs.

Many multifamily properties--and most that were built over twenty years ago--do not have dedicated IDF and MDF rooms, with secure access, power, climate control, code-compliant multipoint grounding busbars as required by the National Electric Code Part 250, etc. At these properties, service providers typically terminate their distribution plants at exterior pedestals or wall-mounted lockboxes, where they can make connections to the inside wiring. Safe, orderly, and secure sharing of home runs at such properties will often pose an insurmountable challenge. Multiple lockboxes would be required: one for each physical cross-connect field, as well as one for each provider's incoming demarcation. Additional electrical power would need to be provided. High cost, space constraints, and environmental conditions (i.e., uncontrolled temperature and humidity) make shared access to home runs at such properties infeasible.

In our dealings with service providers on behalf of MDU owners, we have found that if providers are not given exclusive use of a dedicated home run cable, they will not agree to install that cable at their own expense or reimburse the MDU owner for a substantial part of the installation expense. Providers are naturally reluctant to pay for infrastructure that can be

> used by other providers who did not participate in the installation costs. If a provider cannot be given exclusive use of the home run, the MDU owner usually bears the costs of installation.
>
> In our dealings with service providers on behalf of MDU owners, we have found that, if providers are not given exclusive use of a dedicated home run cable, they will often limit their responsibility for maintenance, repair, replacement, and upgrade of the home run. Just as providers will not pay to install a home run that another provider may use, they will not agree to replace or upgrade such a home run. Furthermore, providers will typically only agree to maintenance and repair of the nonexclusive home run cabling while they are actively using it to deliver service to a resident, or to the extent that the need for maintenance arose from their own acts. When wiring needs to be repaired or replaced, it can be difficult or even impossible to determine who should be responsible for performing the work and bearing the costs. This can result in:
>
> a. delay in repairs during such fact-finding, prolonging the service impact for affected residents;
> b. MDU owners having to perform work for which they generally lack the technical wherewithal;
> c. shifting of maintenance and upgrade costs from providers to MDU owners; or
> d. home run wiring that, over time, becomes less and less fit for use, due to a series of failures to make necessary repairs.

The Reply Comments of Hubacher & Ames, PLLC, submitted in response to the *2017 NOI*, were supported by the Declaration of Kevin Hott, Director of Information Systems & Technology of E&S Ring Management Corp. ("E&S Ring"). E&S Ring owns and manages apartment communities in California and Washington. Mr. Hott's declaration amply illustrates why property owners avoid wire sharing arrangements:[50]

> One of the problems that has surfaced repeatedly is that service providers tend to act in their own best interests when using wiring that these providers neither own nor have a right to use on an exclusive basis. In these shared wiring situations, providers tend to use the wiring as they please without respect to their competition or, more critically, the consumers who live at the MTE.
>
> One recent experience brought this issue front and center and we feel that it is worth sharing with the Commission. E&S Ring manages a large MTE in southern California that contains nearly 1,000 residential units. This community has been served by two different service providers for many years. E&S Ring entered contracts with each of these service providers that allowed each provider to use the owner-owned inside wiring on a non-exclusive basis. In 2007, E&S Ring invested approximately $1.3 million in upgrading the inside wiring at this community, including labeling the inside wiring and installing new "neutral" wiring cabinets

[50] *2017 NOI*, Reply Comments of Hubacher & Ames, PLLC, Appendix Three, Declaration of Kevin S. Hott, ¶¶ 4-9 ("2017 Hott Decl.").

to be shared by each of the providers. This investment was made in our effort to improve the overall quality of the broadband services at this MTE and to make it easier for each provider to connect to the inside wiring. We anticipated that our efforts and expenditures would be rewarded by improved cooperation between the two providers in their joint usage of the inside wiring, which would in turn result in better broadband service and improved customer service for our residents.

In fact, the opposite occurred. Despite our investment, we found that one of the providers (Provider X) has acted in its own interests and has refused to "play nice in the sandbox" with the other provider (Provider Y). Provider X has treated the owner-owned inside wiring as though it was its own wiring over which it had exclusive dominion and control. This appears to be for economic reasons. Provider X has, on more than one occasion, performed its own unauthorized work to the owner-owned inside wiring and to the owner-installed wiring cabinets. Provider X neither owns nor has an exclusive right to use the wiring or the wiring cabinets. These unauthorized acts include (i) the removal of owner-owned patch panels within the neutral cabinets that were designed specifically to support multiple service providers, (ii) installation of Provider X's own taps inside the new wiring cabinets making it difficult (or impossible) for Provider Y to access the inside wiring, (iii) the removal of labeling from the owner-owned wiring and wiring panels that makes unit identification difficult or impossible, and (iv) the installation of lengthy jumper cables within each wiring cabinet that clearly exceeds the capacity of the cabinet, causing cables to bulge out of the cabinets. These activities by Provider X have compromised the ability of these cabinets to be used by Provider Y, making it difficult - and in some cases impossible -- for Provider Y to gain access to the inside wiring. These actions by Provider X certainly appear to be intentional and certainly have had an anti-competitive effect in that Provider Y has had a much harder time getting access to the inside wiring is at a distinct disadvantage on what should be an even playing field.

This has been a repeated and ongoing problem with Provider X at this MTE. After receiving a notification from E&S Ring about this issue in 2016, Provider X visited the MTE to restore the wiring and the new wiring cabinets to the condition E&S Ring had configured them. However, this restorative work was short lived. Within months, a different set of Provider X technicians visited the MTE and did essentially the same thing: performing unauthorized work to the owner-owned inside wiring and wiring cabinets to make it more difficult or impossible for Provider Y to access the inside wiring. In addition, Provider X has caused serious damage to the wiring cabinets that E&S Ring installed as a mechanism to help facilitate the joint use of the inside wiring.

E&S Ring is concerned that this gamesmanship regarding the joint use of our inside wiring will lead to very poor experiences for our residents, who are the consumers of these providers' broadband services. This issue still has not been fully resolved as of the date of this Declaration [August 18, 2017] although E&S Ring has been working tirelessly to prevent residents from being impacted. However, we know that additional restorative work is still needed at the MTE in question in order to repair the damage that Provider X has caused. We have been informed that our residents should expect service outages and delayed installation and service appointments when that work takes place. This is something our residents should not have to experience especially in light of the investment we made in an attempt to prevent this precise situation from occurring.

Fortunately for E&S Ring, there is a contract in place with Provider X at this MTE. That contract, which was the subject of a free market negotiation, contains protections that have

> provided E&S Ring with a legal mechanism to force Provider X to stop its anti-competitive antics, repair the damage, and cooperate with Provider Yin the shared used of the inside wiring. While we are still working with Provider X to reach a final resolution, E &S Ring believes that without a contract that specifically sets forth the rights and responsibilities of Provider X with respect to its use of the owner-owned wiring and wiring cabinets, this situation would have been much worse.

In preparing these Further Comments, the Real Estate Associations contacted E&S Ring to learn if the situation described above had improved. Regrettably, it has not. E&S Ring has submitted a second declaration, recounting the events of the past two years:[51]

> Several developments have transpired at this MTE since we submitted the 2017 Declaration that reinforces our conviction that, in shared wiring situations, providers tend to use the wiring as they please without respect to their competition or, more critically, the consumers who live at the building. We believe these new developments are worth sharing with the Commission and they are set forth below. This situation happened to E&S Ring even though we invested in and manage the inside wiring and even though we entered contracts with both providers that spell out each provider's rights and obligations with respect to the inside wiring. In a situation where there were no contracts and where each provider could "share" internal wiring without any controls or oversight, we are convinced things would be even worse.
>
> The frustrations described in the 2017 Declaration pertaining to Provider X's failure to cooperate in the shared use of the owner-owned internal wiring continued into 2018. As the number of resident complaints increased, E&S Ring contracted with telecommunications consultant Joan Harvey. Ms. Harvey worked directly with frustrated residents who routinely experienced service activation delays and ongoing service issues due to the problems caused by Provider X. E&S Ring also contracted with a low voltage contractor to help. When residents complained, Ms. Harvey would make arrangements on the resident's behalf and set up an on-site meeting between Provider X's technicians and the low voltage contractor to resolve the resident's complaint. These extra costs incurred by E&S Ring were directly related to Provider X's inability or unwillingness to cooperate in the shared use of the internal wiring. Provider Y, on the other hand, continued to cooperate and follow proper procedures in the shared use of the inside wiring.
>
> During this time period, Provider X's service contract at the MTE was close to expiration so Provider X approached E&S Ring about entering a renewal contract so that it could continue to offer broadband service to the MTE once its current contract expired. Negotiations on a new contract continued into 2019. As part of the negotiations, E&S Ring insisted on including a specific contractual provision that described the shared use of the inside wiring with Provider Y and the precise method that Provider X must use to connect to the inside wiring, which connections are to be made ONLY via neutral facilities that E&S Ring installed at the MTE at

[51] Declaration of Kevin Hott, attached as Exhibit J ("2021 Hott Decl.") at ¶¶ 6-10.

its own cost. The language was negotiated at arms' length between E&S Ring's attorney and the attorney for Provider X. After months of back and forth, Provider X's renewal contract was approved and went into effect at the MTE on November 1, 2019.

Despite the new renewal contract and the negotiated *shared use/neutral facilities* provision that was negotiated with and approved by Provider X, the same problems continued at the MTE and are ongoing to this day. Residents continue to experience service issues and technicians and Provider X continue to ignore the contractual provisions and treat the internal wiring as though it was Provider X's property. Word about the "shared use of wiring" has apparently not been properly passed along to Provider X's technicians who actually do the on-site work at the MTE. Our telecommunications consultant Joan Harvey is in touch with Provider X on what is almost a weekly basis due to frustrations voiced by residents. Below is a list of some of the negative experiences in 2021, which are the direct result of Provider X's failure to share the internal wiring properly and in accordance with its contractual obligations:

- On February 8, 2021, Ms. Harvey received a complaint from E&S Ring's low voltage contractors that says Provider X's appear to be "trashing our feed cables again." The contractor said it appeared that, instead of using the neutral facilities, Provider X cut the cables being used by Provider Y and then spliced those cables directly into Provider X's own cabinet, bypassing the neutral facilities altogether and in clear violation of the renewal contract Provider X signed in 2019. Residents in some units were not able to receive Provider Y's services as a result of this improper activity by Provider X. Ms. Harvey contacted Provider X immediately to seek resolution.

- On February 18, 2021, Ms. Harvey met at the MTE for a site visit with supervisors from Provider X, including a Field Office Supervisor. Ms. Harvey explained the issues and showed the Provider X supervisors the specific neutral facilities that Provider X should be using to connect to the inside wiring. The Provider X supervisors explained to Ms. Harvey that the standard training their technicians receive does not include connection to inside wiring via neutral facilities and that their technicians had been following standard procedures when they cut the wiring that Provider Y was using. While the site visit was useful for identifying the issues, Provider X could not assure Ms. Harvey that the MTE would not continue to experience the same problems.

- Even following the February 12 site visit, Ms. Harvey continued to hear complaints and frustrations from residents not being able to receive broadband service due to an issue pertaining to Provider X's inability or unwillingness to cooperate with the shared use of wiring. Ms. Harvey heard from a resident in a different unit on each of the following dates:

  March 3, 2021
  March 16, 2021
  April 5, 2021
  April 26, 2021

May 11, 2021
June 23, 2021
July 21, 2021
August 9, 2021

- On each of these occasions, Ms. Harvey would dispatch the low voltage contractor retained by E&S Ring to assess the problem and then she would eventually contact Provider X's Field Office Supervisor to resolve it.

- While this system has helped to prevent long-term service issues, it has not eliminated many of the short-term service activation delays that our residents have experienced. It also should not be necessary for E&S Ring to expend the type of resources we are forced to expend on this project simply because one of the providers (Provider X) either cannot or will not participate cooperatively in a shared wiring situation, despite its contractual obligations to do just that.

- We again reiterate that we have not had these problems with the other provider (Provider Y) who is a smaller company and who apparently does a better job training its technicians.

In light of our experiences, E&S Ring supports the Real Estate Associations' opposition to any new rules or regulations that would mandate "shared access" to any inside wiring owned by an MTE owner. Based on our experience in the marketplace, E&S Ring strongly rejects the idea that providers who are given unfettered access to owner-owned wiring will do so in a cooperative manner. As our experience shows, service providers do NOT willingly cooperate with each other in these shared wiring situations and that lack of cooperation leads to service disruptions and a poor broadband experience for our residents.

E&S Ring's experience may be extreme, but it is by no means unique. AvalonBay, which currently owns over 80,000 apartment homes and is the fourth largest apartment owner in the United States, submitted the following example in 2019:[52]

> There are many examples demonstrating the problems resulting from service providers sharing wiring. For example, when a resident changes service from Provider X to Provider Y, a technician for Provider X will cut the connector off the ends of the wiring (claiming the connector constitutes the property of Provider X) and then Provider Y's technician arrives and tells the resident that the "owner's wiring" is damaged but the technician can either (i) fix it for a fee to be paid by the resident or (ii) the resident can wait for the property owner to fix the damaged wiring at some point in the future.

[52] *2019 Reply*, Exhibit A, Declaration of AvalonBay Communities, Inc. ("2019 Avalon Bay Decl."), ¶¶ 14-17.

Either way, the resident sustains unwarranted repair fees or delayed service activation. Eventually, the repeated truncation of the wiring causes the wiring to become too short for use, and then it must be replaced, most often at the expense of the property owner. A painful example of this scenario played outat an AVB community in Maryland, but instead of either service provider informing AVB that the shared wiring had become too short to use, the providers simply ran their own above ground wiring. The new wiring created trip hazards throughout the community and left unsightly exposed wiring running up the exterior of buildings at the community. Ultimately, the situation required considerable AVB time and resources to resolve, during which time it impacted the quality of communication services delivered to residents and it reflected poorly on both community management and the service providers.

Another example of wire sharing problems can be found in the use of diplexers. In this situation, Cable Provider X delivers its cable modem broadband service to a resident's apartment home using a coaxial home run wire, and Satellite Provider Y installs a diplexer to transmit its video signal over the same coaxial home run wire. For whatever reason, it seems that Cable Provider X and Satellite Provider Y are never able to deliver their communication services properly to the resident's apartment home. After many truck rolls and much finger pointing to fix the performance problems, the resident eventually gives up and attempts to sign a double-play video and Internet agreement with a single serviceprovider. At that point, the abandoned provider demands an "early termination fee" from the resident, which causes stress for the resident and public relations problems for the property owner.

After suffering through years of these types of problems due to the shared use of wiring, industry members began to realize that allocating dedicated wiring to individual service providers eliminates most of the problems. Allocating dedicated wiring to individual providers also means service providers will assume responsibility for the maintenance and repair of that dedicated wiring, and some service providers will also agree to upgrade that dedicated wiring as needed over time, thereby "future proofing" the wiring. Almost immediately after allocating separate wire for use by each service provider, service providers proved able to promptly resolve wiring problems on installation day because the service provider is responsible for the wiring and will not be compensated for a second truck roll. Residents no longer suffered service delays and wiring repair fees. And property owners no longer incurred the blame for "damaged wiring" or the expense of repairing damaged wiring caused by service providers.

Again, a real world example proves demonstrative. At an AVB community in Virginia, two service providers shared wiring and the community consistently experienced a high frequency of wiring issues. Different apartment homes experienced problems as a result of one provider allegedly disconnecting the other provider’s wiring. Service technicians told new residents that wiring must be replaced due to problems with the owner’s wiring. After months of meetings and attempts at improved coordination between the service providers, the situation miraculously seemed to resolve itself without further AVB involvement. AVB learned that the situation resolved itself only because one service providerinstalled a fiber-to-the-home upgrade and, therefore, the two service providers no longer shared wiring. Since installation of the fiber, the two providers no longer share wiring and there have been no further wiring issues.

Essex Property Trust, Inc., today the twelfth largest apartment owner in the United States, owning over 60,000 apartment homes, submitted this example:[53]

> As a general rule, Essex believes it is critical to have service contracts in place with the providers who serve our communities. . . . Those contracts have helped Essex to resolve issues that were causing poor or disrupted services for our residents. Recently, video and Internet service was out entirely for an entire building at one of our communities in San Mateo California. When we contacted the service provider to try to get service restored for our residents, the provider told us the issue pertained to faulty wiring that was Essex's obligation to repair or replace and that nothing could be done to restore service to our residents until Essex did that work. That was not the case. In fact, Essex had an enforceable contract in place with the provider that clearly made the provider responsible for the repair and replacement of the faulty wiring. The provider had agreed to this maintenance obligation because it had exclusive use of the wiring in question. Ultimately, the provider replaced the wiring and restored services for our residents. Even though we were not pleased with the response time, we at least had a contract in place that required the provider to take some remedial action. We fear the situation would have gone unresolved for even a longer period of time had we not had an enforceable contract in place that clearly spelled out the maintenance obligations with respect to the wiring. This is why Essex opposes mandatory access laws that allow a service provider to deploy services without an enforceable contract that spells out with specificity the maintenance and repair obligations of the parties. This is also an example of why Essex is opposed to any sharing of wiring where no single party has wiring maintenance obligations. We fear that any faulty wiring in a shared-wiring situation may not be quickly repaired and Essex will be in a position of trying to navigate multiple providers over how the wiring will be repaired, who will be responsible for the repairs and what happens to residents' services in the meantime. Thankfully, we were able to avoid that situation at our community in San Mateo thanks to the service contract that clearly spelled out the wiring maintenance obligations.

Apartment owners of all sizes have experienced these problems and reached the same conclusions. For example, Monogram Residential Trust, which has since been acquired by a larger company but at the time operated 34 apartment communities in six states, stated the following in 2017:[54]

> In our experience, properties where multiple providers attempt to share the same home run wiring face a number of practical and technical challenges, including frequent disconnections (whether from inconsistent labeling or the inability for two providers to deliver different services concurrently over the same run), interference, and improper connectorization and splicing that can necessitate total replacement of a home run. At these properties, we have

[53] 2019 Yeh Decl. ¶ 24.

[54] *MBC Petition Comments*, Exhibit E, Declaration of Matt Duncan, ¶¶ 3-4.

> witnessed frequent accidental-and sometimes even intentional-wiring disconnections that have been extremely disruptive to our residents and our management team.
>
> We have recently experienced such problems at an apartment community of over 300 units in the Houston market. While we generally prefer each provider to use its own dedicated home run wiring, Monogram acquired this property, which had only one home run of coaxial cabling to each unit. In order to provide an additional choice of service providers for residents, Monogram permitted two providers to have non-exclusive use of that home run. Unfortunately, instead of residents benefitting from the choice of providers, they have suffered due to the providers' inability to coexist in a competitive environment with shared wiring rights. In effect, the home runs have become a battleground between the providers. The incoming provider repeatedly disconnected wiring and splitters that were actively being used by the existing provider, then failed to properly reconnect, leaving residents without service. On multiple occasions, the property team has been alerted that the incoming provider disconnected all home runs at an intermediate distribution frame, leaving all residents disconnected, except for its own subscribers. This requires wasteful technician deployments by both providers. It has been a source of constant headaches for our management personnel, who are forced to play "referee" in technical disputes. Above all, it greatly inconveniences and aggravates our residents, who are made pawns in a vicious game between providers.

The current record also contains several declarations explaining why owners strongly prefer not to enter into wiring sharing arrangements, without proffering specific examples. Equity Residential, which today owns nearly 80,000 apartment homes and is the fifth largest apartment owner in the country, stated in 2019:[55]

> In my experience, the sharing of wiring by multiple services providers rarely works out well for Equity, residents, or services providers. Services providers utilize technicians, with varying levels of knowledge and expertise, to install and maintain wiring using various different methods. In scenarios where services providers shared wiring, experience shows a significant increase in damage to the shared wiring, disputes related to usage of the shared wiring, unwanted disconnections of communications services (e.g., as a services provider takes use of a wire being actively used by another services provider), and the implementation of equipment (such as signal splitters) that impede one or more services providers' ability to properly deliver communications services to residents.

Equity Residential also stated the following, in 2017:[56]

> The [wiring sharing] provisions of Article 52 will discourage any of our telecom partners from taking on the maintenance and upgrade responsibilities we typically require, since the wiring may be used by any number of other providers. Except on the rare occasion when we can

[55] 2019 Equity Residential Decl. ¶ 25.

[56] *MBC Petition Comments*, Exhibit E, Declaration of Michael Manelis ("Manelis Decl."), ¶¶ 7-8.

> clearly determine who damaged inside wiring, repair obligations will fall to [Equity Residential]. Since our employees lack the necessary technical skill for performing such work, we will have to hire third parties. Efforts to determine fault and, failing that, to coordinate with an independent low voltage contractor take time, unnecessarily prolonging the service problems affecting residents. This also shifts maintenance costs from service providers to property owners. As with other operational costs, those expenses will ultimately be reflected in rents.
>
> Article 52 requires that property owners allow multiple telecom providers to share wiring. In our past experience, the sharing of wiring has rarely worked out well for either the property owner or the residents. Telecom providers utilize technicians, with varying levels of knowledge and expertise, to install and maintain service using various methods. In scenarios where providers have had to share wiring, we have often observed significant increases in damage to wiring and unwanted disconnections of service (e.g., as a provider takes use of a cable being actively used by another provider).

Windsor Property Management Company, the vertically-integrated property management company of GID, today the owner of over 37,000 apartment homes and the 26th largest apartment owner in the United States, has stated:[57]

> We believe the FCC should encourage overbuilding and not promote the sharing of wiring. Our experience when wiring is shared among providers is that it is very difficult to enforce obligations such as repair and maintenance because each provider points to the other as the party that should perform the work. This results in sub-par conditions which reduce the level of telecom/internet services that our residents demand.

Finally, RealPage, Inc. which provides software, data analytics, and technology design services to the real estate industry, has stated:[58]

> It is theoretically possible for two vendors to simultaneously share a wire or fiber but is never prudent. Wire sharing introduces the possibility of interference on the other providers service which would be difficult to trouble shoot, nearly impossible to cure and would inevitably create a poor customer experience.
>
> Wire sharing is not practical and violates network standards as defined by the EIA/TIA standards organizations and BICSI education/certifications.

---

[57] *2019 Comments*, Exhibit H, Declaration of Kimberly Smith ("2019 K. Smith Decl."), ¶ 24.

[58] *2019 Comments*, Exhibit D, Declaration of RealPage, Inc. ("2019 RealPage Decl."), ¶ 29-30.

The foregoing excerpts from declarations already in the record and the update from E&S Ring demonstrate that property owners have ample grounds to avoid sharing of wiring and to enter into agreements granting providers the exclusive right to use wiring. In the *NMHC/NAA 2021 Broadband Survey*, respondents were asked to identify problems they have had as a result of sharing of wiring. They listed the following:

- Connection issues, dispute about who has access to what, wire termination;
- Disconnection of services by other service provider;
- Techs undoing or damaging other provider's work;
- Disputes over quality of service issues;
- Providers blame the owner and each other for damage to wiring and terminations;
- Cut cables, missing cables, re-tagging;
- Inability of new resident to obtain services if the prior resident had another provider and wiring was cut or damaged;
- Outdated infrastructure and no redundancy cause regular outages; and
- Providers sharing cabling meant that a service engineer from one provider would unplug connections on another provider's patch panel accidentally and cause outages.

This discussion illustrates that sharing of wiring rarely works in practice.[59] Any theoretical gain in resident choice or competition is heavily outweighed by the risk of poor service and resident dissatisfaction. This is especially true when one considers that a large majority of apartment residents already have access to at least two wireline broadband providers under the existing types of contracts used in the industry. It would make no sense to introduce a wiring sharing scheme based on the anecdotal complaints of a handful of competitors. These competitors appear to want the government to grant them the right to use, at no charge, infrastructure owned and paid for by either other providers or property owners. This is not how a market economy works or how commercial transactions in this country are conducted.

[59] The Commission has already recognized many of the problems with sharing of wiring. *MBC Ruling*, at ¶¶ 59-63.

B. The Commission Has No Authority To Impose Any Kind of Wiring Sharing Requirement.

In 1992, Congress granted the Commission very limited authority to regulate certain aspects of wiring owned by cable operators. The Commission was directed to "prescribe rules concerning the disposition, after a subscriber to a cable television system terminates service, of any cable installed by a cable operator within the premises of such subscriber."[60] Under this authority, the Commission adopted the current cable inside wiring rules.[61] But this is the limit of the Commission's authority in this regard, and the statute is very clear on two key points.

First, the subject of the rules is "cable installed by a cable operator within the premises of [a] subscriber." An apartment owner is not a subscriber, and the home run wiring that is fundamentally at issue here is not within the premises of any subscriber.[62] The statute does not refer to wiring owned by the property owner and the Commission has no general jurisdiction over property owners.[63] Second, the rules are to concern the "disposition" of wiring installed by a cable operator, "after a subscriber . . . terminates service." As we discussed in the *2019 Comments*, the rules adopted by the Commission effectively turned wiring over to property owners if the cable operator did not comply with various procedural requirements. But that was wiring owned by cable operators, and owners acquired control, if not always title, through the

---

[60] 47 U.S.C. § 544(i).

[61] 47 C.F.R. §§ 76.801-806. These rules apply not only to cable operators, but to all multichannel video programming distributors.

[62] An apartment owner might be deemed a subscriber under the terms of a bulk service agreement, but such agreements are not at issue here.

[63] "[T]he Communications Act does not explicitly address the landlord tenant relationship, nor does it explicitly grant the Commission jurisdiction over the real estate industry, an area that is normally outside the Commission's scope of authority." *Bldg. Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 94 (D.C. Cir. 2001).

operation of the Commission's own rules. Since then, however, and for roughly the past 15 years if not longer, wiring used by cable operators is typically installed by and owned by the property owner. Such wiring is not subject to the statute or the Commission's rules at all.

The Commission has also exercised authority over copper telecommunications wiring installed by the ILECs inside buildings. In 1990, however, the Commission declared that building owners could take control of such wiring, subject to the historical placement of the demarcation point by the telephone company and state law.[64] The ILECs generally assert that they still control such wiring and will not allow a third party serving a building to connect to it. Upgrading of such wiring to enable delivery of high-speed broadband service is often a topic of negotiation between property owners and the ILECs, and the telephone company will often refuse.[65]

Furthermore – and most importantly -- the Commission has relieved the telephone companies of any obligation to share their fiber facilities with third parties. Although the cable inside wiring rules apply to all multichannel video programming providers, the ILECs claim to be exempt from those rules. Thus, the cable operators and the telephone companies are playing on two completely different fields.

Consequently, as the Real Estate Associations explained in the *2019 Comments*, regardless of the Commission's authority, the Commission's past decisions make it impossible to establish an equitable wire sharing scheme. Even if the Commission reasserts authority over broadband service in a way that permits it to regulate facilities owned by all types of broadband

---

[64] *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket No. 88-57, Order and Further Notice of Proposed Rulemaking, 5 FCC Rcd 4686, 4693 (1990).

[65] McDonald Decl. at ¶ 14; 2021 A. Smith Decl. at ¶ 9.

providers, the Commission would have to require AT&T and Verizon to share their facilities and preempt the thousands of contracts those companies have entered into with property owners, in which the providers insisted on retaining title to facilities running to each apartment unit. Yet neither the *NPRM* nor the *2021 Notice* have even hinted at such a solution. Furthermore, even if the Commission had authority over wiring that is the property of apartment owners, attempting to impose a sharing scheme on such wiring without requiring all classes of provider to share their facilities would surely be an arbitrary and indefensible act. We urge the Commission to carefully consider the arguments made in pages 31-41 of the *2019 Comments* on this point.

Finally, forced sharing of wiring would violate the Takings Clause of the Fifth Amendment just as much as a rule forcing owners to accept physical entry to a building by a third party. The Takings Clause applies to personal property as well as to real estate.[66] Sharing is a form of occupancy because it deprives the owner of the wiring of the ability to use the wiring for its own purposes, or to allow a user of its choice to do so.[67] This is especially true in light of the problems created by sharing – forcing sharing not only prevents the owner from using (or not using) the wiring in the manner preferred by the owner, but poses a high risk of physical interference with the wiring in the ways described by property owners in the declarations excerpted above.

---

[66] *Horne v. Dep't of Agriculture*, 576 U.S. 351, 359-360 (2015).

[67] *Cable Investments Inc. v. Woolley*, 867 F.2d 151, 160 (3d Cir. 1989) (*"Woolley"*)(requirement that one operator permit competitor to use its lines "could be viewed to effect a permanent occupation of . . . property which would constitute a taking"), *citing Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982). One of the reasons that the Commission's cable inside wiring rules are so complicated is that the Commission was trying to stay within the confines of the Fifth Amendment. Those rules allow for sharing of wiring on a unit-by-unit basis, but only after a lengthy process intended to give the provider the options of selling the wiring, removing, it or abandoning it. 47 C.F.R. § 76.804.

C. Sharing of Wiring, Conduit, and Equipment Closets in Office Buildings and Retail Centers Raises the Same Issues.

The *2021 Notice* asks about shared access to facilities in MTEs, including telecom closets, conduit, and wiring, apparently referring primarily to commercial buildings. The *2019 Comments* clearly state that "[o]wners and managers of commercial and retail real estate also operate in a competitive environment and must respond to tenant demand in much the same way as apartment owners respond to their residents . . . . Consequently, property owners will routinely grant multiple providers the right to serve their buildings in order to meet tenant requests."[68] There is also no evidence in the record of a lack of competition in those markets.[69]

The *2019 Comments* did note that equipment closets, ducts, and risers can become crowded – of course, when this happens it is usually because the owner has already accommodated multiple providers. As to wiring, what providers want is the ability to install their own wiring to serve their customers. They need to have control to assure service quality. Owners accommodate that desire. Sharing of wiring in a commercial context is simply impractical for the same reasons as discussed above in the apartment context: who will maintain the wiring and oversee the activities of the many providers in the building? Property owners have no expertise in this field. Nor should the Commission want to put them in that position, for that very reason.

Furthermore, when the Commission and the communications industry learned that a handful of property owners were planning to install and manage wiring and services in their buildings in the early 2000s, there was considerable consternation over the possibility that the so-

---

[68] *2019 Comments* at 13.

[69] *2019 Reply* at 20-22.

called "BLECs" would become commonplace.[70] This did not come to pass because the real estate industry understood then, as it does now, that commercial and retail tenants are better able to meet their evolving technological and operational needs if they can get service from the provider of their choice.

In any event, there is ample sharing of other facilities in buildings, where it makes practical and economic sense. Equipment closets are routinely shared. In new construction today and in most construction done over the past 20-25 years, there is generally ample space. This depends, however, on the size and age of the building. Wiring panels are not shared because providers do not share wiring. Conduit may be shared, but there is no way to anticipate in advance how many providers might need access, and at some point it is possible that conduit space fills up. When that occurs, a provider may need to bear the cost of new conduit, if there is room for the conduit. Again, this may depend on the age and size of the building.

Fundamentally, however, there is no significant problem with the delivery of broadband services in the office and retail context. There is thus no need for regulation.

Finally, the Commission has no statutory authority to compel property owners to expand space in risers, conduit, or equipment closets. The Commission may be able to mandate that service providers share the facilities they own, but it cannot force property owners to perform construction or spend money for any purpose unless they are also providing a service regulated under the terms of the Communications Act. On the other hand, free market negotiations between owners and providers allow the interested parties to work out who should pay for what, and how much.

---

[70] *In the Matter of Competitive Networks*, WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, ¶¶ 154-55 (2000)

IV. EXCLUSIVE USE OF WIRING, EXCLUSIVE MARKETING, AND PAYMENT OF COMPENSATION TO PROPERTY OWNERS BENEFIT CONSUMERS BY PROMOTING DEPLOYMENT OF HIGH-SPEED BROADBAND SERVICE AND ENHANCED SERVICE QUALITY STANDARDS.

In the *2019 Comments*, the Real Estate Associations described in detail the reasons that apartment owners enter into the various types of agreements under review in this docket, and the benefits to residents of such agreements.[71] In essence, these agreements serve three important functions. First, they promote deployment of broadband service by compensating owners for assuming a small portion of the cost of installing or upgrading facilities used by the provider. The *2019 Comments* discussed the substantial costs borne by property owners, first in developing new apartment communities, and later in subsidizing facilities to be used by providers to deliver their services.[72] As we noted in the Introduction to these Further Comments, development costs can range from roughly $50 million in today's market to the hundreds of millions of dollars. The wiring installation costs borne by owners can range into the hundreds of thousands.

For example, Greg McDonald, a long-time apartment industry expert, reports that the average cost of an internal wiring system in a new development project is in the range of $400-$500 per apartment unit, based on costs for a 250-unit property. After adding $150 per unit for the media panel in each unit, the total cost can range from $137,500 to $162,500. The lion's share of these costs – if not 100% -- is borne by the property owner, but the $150 - $200 door fee paid by the provider in an exclusive wiring agreement only covers about a third of the total.[73]

---

[71] *2019 Comments* at 57-67.

[72] *2019 Comments* at 14-16.

[73] McDonald Decl. at ¶¶ 10-12.

Continental Properties lists the following costs, which total approximately $191,500 to $262,000 for a 300-unit apartment community:[74]

- Site infrastructure, including conduit and fiber: $50,000 to $150,000, shared between ISP and owner depending on requirements;
- Building infrastructure, including pedestal boxes, interior cabling, unit wiring: $50,000 to $75,000, borne by owner;
- Main Distribution Frame: $5,000, paid by owner;
- Wireless infrastructure throughout site; provided and managed by the ISP, but Continental pays $60,000 for equipment, plus recurring management fee to the ISP;[75]
- Continental also assumes responsibility for the following costs:
    - Electrical connections in main communications room: $1500 to $2000;
    - Electrical connection in intermediate communications rooms: $10,000;

[74] 2021 Grimm Decl. at ¶¶ 8-10.

[75] This item on Continental's cost list, for WiFi deployment, is significant for several reasons. In these Further Comments we have addressed the speeds offered inside buildings by the cable MSOs, the ILECs, and fixed wireless and fiber broadband competitors, as well as the importance of competition. But of course, improving wireless service inside buildings is also critical, especially because of the radio frequency propagation problems that arise from modern construction techniques. Apartment residents have been known to move out or walk away from a potential lease because they could not connect with their preferred wireless carrier. And residents expect to have WiFi access in common areas as a matter of course. Consequently, apartment owners, as well as commercial office and retail owners, are expending significant sums to ensure reliable wireless service inside their buildings. We addressed some of the costs involved with DAS installations in the 2019 Comments. *2019 Comments* at 16-17, 84-87.

There are two other aspects of wireless service that may affect service quality in the future. The first is that some apartment owners are beginning to introduce managed WiFi networks capable of providing high-speed Internet access in every apartment unit and throughout the property. These networks are especially useful when integrating IoT functions, including applications used by residents in their units, but also property-wide security and utility-management functions, among others. These networks are typically installed and managed on a bulk service basis. The other aspect is the deployment of 5G capability. Like the DAS installations discussed in the *2019 Comments* and the managed WiFi systems, deployment of 5G will undoubtedly require considerable investment by apartment owners (unless there is a compatible WiFi network in place), and comparable investments will certainly be needed in office buildings and retail centers, to ensure property-wide 5G coverage. Deployment of 5G is particularly relevant in the context of this proceeding, because when that happens, wireless speeds inside buildings will presumably increase significantly and residents will have yet another competitive option.

- Installation of home-run wiring from intermediate communications rooms to each apartment unit: $30,000 to $50,000 per site; and
- Adding power outlet in each apartment unit: $100 to $200 in each unit (30,000 to $60,000 total).

Mill Creek has provided the following list of partial costs incurred on a 334-unit community in New York:[76]

- $10,000 for interior and exterior conduit;
- $56,000 for installation of home-run wiring from intermediate communication rooms to each apartment unit;
- $193,600 for in-unit cabling installation, termination, and faceplates;
- $24,000 for low-voltage design work;
- $5,150 for overhead design and implementation services;
- $52,000 to provide and install apartment distribution panels in each unit to allow multiple providers to access in-unit wiring.

This incomplete list comes to a total of $340,750.[77] Mill Creek will receive a one-time door fee of $33,400 ($100 per apartment unit) and second one-time payment of $12,525.[78] A separate annual revenue sharing payment is expected to yield $6,252 per year.[79] If all of those payments are made, it will take 47 years for Mill Creek to recover its initial expenditure. As Jeffrey Kok of Mill Creek states in his declaration:[80]

> Upfront payments (aka "door fees") and revenue share agreements in telecommunications agreements are not money-makers for Mill Creek. They merely serve to place some of the cost burden of telecom infrastructure on the provider who will use and benefit from it.

Clearly, owners are expending significant sums to ensure that residents have access to state-of-the-art broadband infrastructure. These expenses lower the cost of entry to providers, and it is hardly unreasonable for providers to pay a share.

---

[76] Kok Decl. at ¶ 14.

[77] Kok Decl. at ¶ 15.

[78] *Id.*

[79] *Id.*

[80] Kok Decl. at ¶ 16.

Second, wiring agreements promote deployment by assuring providers that they will retain control of facilities they use to provide the service. And third, they assure residents of reliable, high quality service by assigning responsibility for maintenance of facilities to a single entity – the provider using the facilities – with the necessary technical knowledge and capability, and by inducing providers to agree to service-level standards enforceable by the owner, on behalf of residents.

The proposals under consideration might benefit providers by lowering the cost of entry – but they would do nothing to actually promote entry by competitors, especially in smaller, lower- or middle-income and other similar properties. Owners will continue to make decisions about entry based on the needs of residents, the quality and reputation of the potential competitor, and the potential financial and management burdens imposed by the presence of an additional provider. Consequently, if adopted, rules governing compensation, exclusive use of wiring, or exclusive marketing would advance neither competition nor deployment.

A. Compensation Paid to Building Owners Is an Integral Component of Exclusive Wiring and Marketing Agreements.

The *2021 Notice* asks a number of questions about agreements that provide for the payment of compensation by a broadband provider to an apartment owner. Unfortunately, the *2021 Notice* attempts to analyze issues related to compensation in isolation, without acknowledging that compensation is an integral part of any marketing agreement, whether exclusive or nonexclusive, and is typically, although not always, an element of an exclusive wiring agreement. Exactly what a provider is paying for, how much, and why, depends on numerous factors unique to the building and the technical and business needs of the provider. Because of the intimate relationship between compensation and the other terms of these

agreements it can be difficult to answer many of the questions posed in the *2021 Notice*, as they are presented.

For example, prohibiting providers from paying for marketing rights would have the effect of banning not only exclusive marketing agreements, but non-exclusive marketing agreements, as well. There would be no reason for an owner to grant any marketing rights if it were not being compensated. On the other hand, prohibiting providers from paying for exclusive wiring rights would not necessarily have the effect of banning such agreements, but it would do nothing to promote entry by a competitor. The Real Estate Associations urge the Commission to bear this in mind when assessing the information submitted by commenters.

In any event, speaking in general terms, there is nothing exclusionary about contracts that provide for one party to pay another.

Payments by Incumbent Providers. An agreement requiring an incumbent provider to pay an owner does not harm the competitor. If anything, it imposes a cost on the incumbent. Of course, the incumbent receives something for the payment, depending on the other terms of the agreement, but payment alone does not prevent the owner from entering into an agreement with a competitor, nor does it prevent the competitor from entering the property.

Payments by Competitive Providers. Competitive providers also have no basis for objecting to paying owners under appropriate circumstances. After all, if the incumbent is paying a fee and the owner requests comparable compensation from a competitor, both the competitor and the incumbent are being treated fairly. On the other hand, if the incumbent assumed the entire cost of installing its facilities but the competitor is asking the owner to pay a share of its cost, it may be reasonable for the owner to expect reimbursement from the competitor even if the incumbent paid nothing.

Banning or limiting compensation would presumably lower costs for competitors, but so would regulating all manner of other costs. We have demonstrated that the actual dollar amounts received by owners are relatively small[81] – if the goal is to reduce costs to competitors, a more effective approach would surely be to regulate the price of optical fiber or antenna housings or other equipment, which very likely represent a much larger proportion of providers' costs.

Banning or Limiting Compensation to Owners. The question underlying every negotiation between an owner and a provider is whether the provider can make the case to the owner for the value of adding its service as an option for residents. Owners don't enter into exclusive wiring agreements because they want to exclude competitors; they do it because (as discussed below at Part IV(D)) the quality and reliability of service improves when each provider is responsible for its own facilities. Furthermore, owners routinely enter into access agreements with Verizon and AT&T, under which the provider retains control of the wiring it installs, and under which the owner receives no compensation. The only rationale for regulating compensation is that some competitors would rather not pay their own way.

As we will see below, and as discussed in the *2017 Petition Comments*,[82] and *2017 NOI Comments*,[83] payment of compensation to owners benefits residents. The grant of exclusive rights to providers does the same.

---

[81] *2019 Comments* at 79-81, discussing typical door fee and marketing fee in relation to rent revenue and risk of losing residents; *see also* Austin Decl. at ¶¶ 23-24; McDonald Decl. at ¶ 11 (door fees range from $150 - $200 per unit); discussion at Part IV(C), below.

[82] *2017 Petition Comments* at 11-12.

[83] *2017 NOI Comments* at 10.

B. The Claim that Owner Requests for Compensation Prevent Deployment Is a Red Herring.

The *2021 Notice* asks: "*If revenue sharing agreements function to prevent competing providers from deploying, does the MTE in effect become a locational monopoly?*" The premise of this question is deeply flawed. Merely because owners may ask competitive providers to compensate them for subsidizing the cost of infrastructure or some other benefit does not create a monopoly or justify regulation. Apparently, the Commission is concerned that a small number of broadband providers might dominate the market if property owners are allowed to charge competitors for access, use of wiring, or on some other basis. There are three problems with this theory.

First, once again, there is ample competition in all types of properties in which providers pay owners any kind of fee. Commercial office buildings routinely grant access to providers at the request of individual tenants, even if there are already multiple providers in the building. Furthermore, such providers typically pay no more than $100-200 a month to compensate the owner for access to the building. In many instances, providers pay office building owners nothing at all. In the apartment industry, there are also property owners that do not receive any compensation from providers: exclusive wiring and exclusive marketing and compensation are uncommon in smaller, lower-income properties because these properties often have trouble attracting even one provider. On the other hand, in the rest of the market, we know that compensation is not a barrier to entry, because79% of apartment properties owned by the average survey respondent are served by at least two broadband providers,[84] and the compensation paid to those owners is truly modest.

---

[84] *NMHC/NAA 2021 Broadband Survey.*

The second problem is that the Commission has not defined what constitutes effective competition. Is an owner expected to grant access to all comers, regardless of the burden on the owner and the building? Surely that would be unreasonable. If the Commission has the authority to define effective competition in the broadband market, then it should do so. In fact, it does not. Nor can the Commission rely on a "vague and general desire to promote competition" to justify interfering with the property rights of building owners.[85]

Furthermore, as we discussed in the *2019 Comments*, under the effective competition provisions of the Cable Act,[86] the Commission has declared, in effect, that one satellite provider and one cable operator are sufficient in the video market.[87] One cable operator and one local exchange carrier also suffice.[88] How can it be then that property owners must grant access to some undefined number of broadband providers, and furthermore, do so at no cost to the provider? Because to be clear, that is what certain providers are asking for: a government grant of free access to property they do not own.

Third, it is unreasonable for providers to complain of delays in getting access arising from owners' requests for compensation. Compensation is not the only significant issue that the parties need to address. It appears that some providers want to use somebody else's property but are either unwilling to pay a reasonable fee or unwilling to take the time to negotiate a fair agreement. There is no statute or legal principle that says that building owners are not permitted to obtain compensation for entry to or use of their property, or to negotiate other terms that they

---

[85] *Century Southwest*, 33 F.3d at 1071.

[86] 47 U.S.C. §§ 543(a)(2), (l); 47 C.F.R. § 76.905(b).

[87] 47 C.F.R. § 76.905(b)(2).

[88] 47 C.F.R. § 76.905(b)(4).

find acceptable. In fact, the United States Supreme Court has repeatedly held that the "right to exclude" is "one of the most treasured rights of property ownership,"[89] and "universally held to be a fundamental element of the property right."[90] To protect that right, access agreements must address a broad range of issues, common to many other types of business contracts. Any access agreement negotiated by knowledgeable counsel will address a long list of other issues, including the following:

1. The length of the access right;
2. Ownership and use of wiring and other facilities;
3. Terms of access to the property for maintenance and other purposes;
4. Responsibility for maintenance;
5. Definition of services to be provided;
6. Fees and charges for services;
7. Customer service obligations;
8. Signal leakage and interference;
9. Marketing rights, if any;
10. Insurance;
11. Indemnification;
12. Termination and default;
13. Relocation of facilities;
14. Removal at the end of the term of any facilities not owned by the building owner;
15. Dispute resolution;
16. Liens; and
17. Supervision and obligations of contractors.

These agreements are complex legal documents because protecting the interests of residents through effective service provisions and the interests of the owner in the integrity of the building require considerable attention. Negotiation begins when the provider presents its business proposal to the owner, but it doesn't end there. These deals take time precisely because they are

[89] *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982).

[90] *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

important. Consequently, any claim that an owner's request for compensation creates some singular delay that prevents access by competitors is a red herring.

C. Attempting To Regulate "Above-Cost" Compensation Would Be Impractical and Complex, and Would Not Advance the Commission's Goals.

The *2021 Notice* asks whether the Commission should regulate "above-cost revenue sharing agreements." This is a highly questionable proposal, for three reasons.

First, there is no need to regulate any kind of agreement that requires a broadband provider to compensate an apartment owner because, as the Real Estate Associations have shown, there is ample competition in the multifamily industry.[91] We have also shown that it is common for different providers serving a property to negotiate different terms, so that one provider is paying a fee and another is not.[92] And we have demonstrated that the fees owners receive from broadband providers are simply not large enough to create an incentive to deny entry to competitive providers.[93] Neither the agreements nor their terms nor their effects are anticompetitive.

Second, the Commission lacks statutory authority to engage in this type of regulation. In 2018, the Commission ended utility-style regulation of the Internet and eliminated conduct rules on ISPs.[94] Those regulations were more closely related to the actual services broadband providers deliver than any regulation of compensation paid by a provider to a property owner. Regulating a provider's costs, such as whatever it pays for access to real estate, smacks very

---

[91] See Part II(A).

[92] *2019 Comments* at 64-67.

[93] *2019 Comments* at 80-81.

[94] *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, 33 FCC Rcd 311 (2018).

much of the utility-style regulation the Commission abandoned long ago. And regulating a fee by reference to a property owner's costs is even further removed.

Even if the Commission reasserts authority over broadband service in a future net neutrality proceeding, it is very hard to see how the Commission could justify regulating compensation paid by a broadband provider to a property owner. The Commission no longer regulates what common carriers charge their subscribers and has effectively deregulated cable rates. The Commission's authority in those two areas was clearly granted by Congress.[95] When the Commission adopted its cable inside wiring rules and the ban on exclusive access agreements, it grounded its rules in specific statutes governing the activities of cable operators.[96] In this case, however, nothing in the Communications Act suggests that Congress meant to regulate, in any fashion, payments to property owners. Under these circumstances, it would be remarkable for the agency to conclude that it can regulate this one type of transaction, especially in view of the evidence that without such payments, providers would simply have to cover the full cost of infrastructure construction.

Third, as we discuss in detail below, even if the Commission had the necessary authority, the endeavor would be so complex as to be impractical, particularly when one considers the small dollar amounts involved.

In raising this issue, the *2021 Notice* suggests that the costs to be considered would be "actual costs associated with the installation and maintenance of wiring." This formulation is

---

[95] 47 U.S.C. § 205(a) (Commission authorized to determine just and reasonable charges); § 215 (Commission to examine transaction relating to furnishing of equipment, supplies, and other resources of common carriers); § 220 (a)(2) (Commission to prescribe uniform system of accounts to ensure proper allocation of costs), § 224 (Commission to regulate rates, terms, and conditions for pole attachments); 47 U.S.C. § 543.

[96] 47 U.S.C. § 544(i); 47 U.S.C. § 548.

completely inadequate, because those costs are not the only relevant factors. A fair and comprehensive evaluation of the basis for payments to owners would need to account for (i) expenses and other costs arising directly from installation; (ii) all operating costs, including those incurred by the owner to support the provider's presence and maintain the property as an attractive place for the provider's subscribers to live; and (iii) some share of the initial capital cost of development and construction of the apartment community. Without the substantial investments made by property owners in every single apartment community in the country – ranging from the tens of millions of dollars to well over $100 million for each new development – there would be no MTE market for competitive broadband providers to serve and they would be forced to compete only in the single-family market. In fact, the additional capital investment needed to serve only single-family residences would put most such competitors out of business. The formulation in the *2021 Notice* thus misses the mark completely.

1. Apartment Owners Assume Responsibility for a Broad Range of Costs.

In the *2019 Comments*, the Real Estate Associations identified many of the costs incurred by owners when installing or upgrading wiring for the benefit of a broadband provider.[97] The *2019 Reply* included the Declaration of AvalonBay Communities, Inc., which included a comprehensive list of such costs.[98] The record thus demonstrates that, in addition to the general costs of developing, constructing, maintaining, and operating the apartment community, all of

[97] *2019 Comments* at 14-16, 59-63.

[98] 2019 AvalonBay Decl. at ¶¶ 19-25.

which benefit each provider that serves the community, apartment owners often subsidize the entry and presence of broadband providers by incurring a long list of costs and expenses.[99]

In the *NMHC/NAA 2021 Broadband Survey*, owners and managers were asked about those costs. The table on the next page identifies the proportion of respondents who stated that they have incurred each of the listed categories of expenses:

[99] 2019 AvalonBay Decl. at ¶¶ 19-25; *2019 Comments*, Declaration of Arthur Hubacher ("2019 Hubacher Decl.") at App. C; *2019 Comments*, Declaration of AMLI Management Company ("2019 AMLI Decl.") at ¶¶ 21-22; 2019 K. Smith Decl. at ¶¶ 16, 19-20; 2019 Yeh Decl. at ¶ 18; 2019 Equity Residential Decl. at ¶18; 2019 RealPage Decl. at ¶¶ 25-28.

Description of Costs Incurred by Owners and Managers	% of Respondents
Installation of exterior conduit for provider's connection to the property	61.9%
Installation of interior conduit, microduct, or both	66.7%
Installation of in-unit wiring (new construction)	76.20%
Upgrade of in-unit wiring (retrofit)	14.3%
Installation of wiring panels in main communications room (new construction)	47.6%
Replacement or expansion of wiring panels in main communications room (retrofit)	14.3%
Expansion of equipment closet space in main communications room	47.6%
Electrical connections in main communications room	71.4%
Expansion of space in intermediate communications rooms	42.9%
Electrical connection in intermediate communications rooms	76.2%
Installation of home-run wiring from intermediate communications rooms to each apartment unit	61.9%
Adding broadband drop/faceplate in each apartment unit	67.1%
Adding power outlet in each apartment unit	71.4%
Project oversight by property management team	76.2%
Post-installation building repair	38.1%
Post-installation landscaping	52.4%
Electric utility charges for power used by provider equipment	76.2%
Engineering and system design review	71.4%
Labor cost to provide security when provider is working in occupied apartment unit	52.4%
Labor cost of oversight of installation of provider's facilities	76.2%
Other	23.8%

2. Operating Costs Borne by the Owner Can Be a Significant Factor.

As long as a provider maintains a presence on a property, the apartment owner will incur additional costs. For example, if a resident has a complaint regarding the quality of the

provider's service, the owner's management team has to address it, and solving the problem may be difficult and time-consuming. If the provider needs to do work on site, coordination with building management may be required. And the owner's overall management, maintenance, and upgrade or renovation work all benefit the provider because the higher the occupancy of the building, the larger the provider's potential market will be. If the owner does not pay the expenses needed to maintain and operate the property, it will fall into disrepair and become less attractive to residents. This would in turn reduce both the owner's rent revenue and the provider's subscription revenue.

These costs may be difficult to quantify and allocate, but a fair regulatory scheme would try to take them into account. It also bears mention that any operating costs imposed by a provider's activities on the owner that are not reimbursed in some way will inevitably be paid by the residents of the apartment community, in the form of rent.

One category of operating costs that is not really at issue is the cost of maintaining wiring. This is because one of the primary purposes of an exclusive wiring agreement is to assign responsibility for maintenance to the provider. Apartment owners do not have the expertise to undertake this task.[100]

Another category of operating costs is especially important, however, and quantifiable: Electric utility charges for power used by the provider's equipment. Owners typically agree simply to absorb these costs as part of the building's general electricity bill, which clearly benefits the provider. In the past, when twisted copper pair and coaxial cable were the norm, this was not an issue, but fiber optic systems must be powered separately, as must wireless systems.

For example, in 2019 AvalonBay stated that:

---

[100] Manelis Decl. at ¶ 6.

> The latest trend among many service providers is "always active" WiFi service within apartment homes, which requires that the service provider install a live wireless access point ("WAP") in each apartment home to enable prospective subscribers to walk into an apartment home and immediately activate broadband service without the need for a truck roll by the service provider. In order for "always active" to work, the property owner must install a plus-sized distribution panel in each apartment home to continuously house the service provider's WAP, and also install extra electrical capacity because the WAP must remain powered on at all times. In addition to the extra infrastructure expense passed to the property owner, each active WAP in each unit consumes approximately $26 in electricity per year, at the property owner's expense.[101]

Twenty-six dollars per unit may not seem like very much – at a 100-unit property it is $2600 per year. But as we noted in 2019, a typical door fee at a property that size yields $3000 a year in revenue, and a typical 5% marketing fee would yield $3000. Thus, in relation to what the provider pays the owner, electricity alone is a substantial cost, without even considering, in this example, the cost of the larger distribution panel or any other costs.

In refreshing the record, the Real Estate Associations gathered additional information about utility costs. Although not a major factor, the cost of electricity consumed by broadband equipment is still significant, and would need to be included in any calculation. Greg McDonald reports that monthly charges for backbone system power in a building is typically $75-100 a month, or about $1200 a year.[102] Continental does not offer a specific amount, but estimates it to be in the thousands of dollars a year for a typical property.[103]

3. The Cost Allocable to a Broadband Provider of Creating an Apartment Community Far Exceeds Any Amounts Paid by the Provider to the Owner.

The Commission also would need to assign a value to the capital costs incurred by the owner in creating the opportunity for the provider to serve the residents of the apartment

[101] 2019 AvalonBay Decl. at ¶ 22.

[102] McDonald Decl. at ¶ 12.

[103] 2021 Grimm Decl. at ¶ 10.

community. Cost allocation is a complex and difficult process and there may be more than one method that could be applied in this case, but from an economic perspective these capital costs benefit providers and if compensation were to be regulated on the basis of cost they would need to be considered in some fashion.

Perhaps the most straightforward way to begin assigning a value to a provider's share of an owner's cost would be to compare the revenue streams generated by the property for each business. To update our example from 2019, let us assume a property with 100 units. The national median apartment rent is approximately $1100 per month[104] (an increase from $1010 in 2019) and the median cost of broadband service is roughly $50 a month.[105] In such a case, the maximum rent revenue the owner would receive at the property is $1,320,000 per year, if the building were fully occupied. We will also assume that if every resident took the service, the maximum revenue a single provider or combination of providers could earn from delivering broadband service to residents would be $60,000 a year. Of course, some might pay more for higher speeds, and if the provider also offers video or voice service there would be substantial additional revenue, but we will ignore that for this analysis. Finally, the cost to build an apartment property varies substantially even among properties of the same size. For a 100-unit building or complex, costs nationally can range from $30 to $100 million dollars. Continental reported that its development costs in 2019 began at $35 million and have since gone up to just

[104] Source: NMHC tabulations of 2019 American Community Survey microdata, https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-market-conditions/#mediangrossrent (last visited Oct. 18, 2021).

[105] In 2019, Equity Residential provided a version of this analysis using actual figures from their portfolio, with very similar results. 2019 Equity Residential Decl. at ¶¶ 23-24. We are using this particular example to keep the numbers and the math simple.

under $50 million at the low end. So as not to overstate the case, we will use $30 million in this example.

In our back-of-the-envelope calculation, the property owner is earning $1.32 million a year on its investment in the building (less expenses). The provider is earning $60,000 a year on its investment in the building (less its expenses). On a gross revenue basis, the provider is therefore earning 4.5% as much as the owner of the property. Therefore, on the basis of the revenue stream, if we assume further that the rent and the broadband subscription fees remain roughly constant or at least proportional, and the provider or a successor provider will remain on the property throughout the useful life of the building, it would be reasonable to allocate 4.5% of the cost of the building to the broadband provider. Four-and-half percent of $30 million is $1,350,000. In other words, $1.35 million, or 4.5% of the owner's investment, has been expended for the benefit of the broadband provider through the creation of the apartment community, which amounts to creating the opportunity for the provider to sell its service.

To be fair and accurate, however, we must also consider that both the owner and the provider benefit from each other's investment. As we noted in the Introduction, this is a symbiotic relationship. The provider's revenue would be zero if the building didn't exist. And the owner's revenue would surely be reduced if there were no broadband service in the building, although it is difficult to say by how much.

To that last point, let us look at the case of the first provider. We will assume that a building without broadband service loses 90% of its value. In other words, a high vacancy rate would presumably force the owner to reduce its rent substantially. This is obviously a very unrealistic scenario, but let us see how the numbers might play out.

A 90% reduction in the assumed cost of $30 million would mean that the property would have a value of $3 million (assuming for the sake of simplicity that cost and value are the same). Using the 4.5% ratio of subscription revenue to rent revenue, one could argue that the share of the development and construction costs allocable to the first provider should therefore only be $135,000. A much smaller figure -- but if we are going to try to assess the amount of the owner's costs associated with the presence of the provider it still needs to be taken into account.

Notice, however, that once there is one broadband provider in a building, the owner's essential need has been met. The first provider adds critical value. In the case of a second provider, however, the question is not how much do potential residents value the availability of broadband service, but how much do they value having a choice of provider? One could perform a different calculation to obtain a figure that would represent an appropriate amount of initial development costs to allocate to a second provider and each additional provider. There is no need to do that here, because as we will see in a moment, in a typical transaction, using standard door fees and revenue shares, the owner will not recover all of its costs even in the case of the first provider.

In the *2019 Comments*, we demonstrated that the risk of losing a single resident per year over bad broadband service or a lack of choice outweighs any benefit from the revenue an owner might receive from a provider. If the owner in our example of the 100-unit building receives a typical door fee of $150 per unit,[106] a typical five-year agreement with a cable MSO would yield a one-time door fee of $15,000, the equivalent of $3000 a year. A 5% marketing fee would produce additional revenue of $3000. In other words, the property owner would earn

[106] Door fees range from $0 to $250 per unit. *See* 2019 Equity Residential Decl. at ¶10; 2019 K. Smith Decl. at ¶11; 2019 AMLI Decl. at ¶12.

approximately $6000 a year in fees from the broadband provider or providers. Our point then was that the annual rent revenue from a single unit would be $12,120, more than twice the annual fees received under a standard exclusive wiring and exclusive marketing arrangement.

In the current example, even excluding the limited categories of costs referred to in the *2021 Notice*, the owner has incurred $135,000 in costs that benefit the first provider to serve the property. Again, we can compare this number to the amount of a combined door fee and revenue share, which would be approximately a mere $6,000 a year. At that rate, it would take 22 years to recover the amount of the owner's costs allocable to the provider, without taking into account any subsequent expenses incurred on the provider's behalf by the owner.[107]

As a way of checking the reasonableness of our methodology, we can compare the portion of the owner's capital cost allocable to the provider to the provider's revenue stream. This is useful because that revenue stream represents the actual value to the provider of its presence in the building. Ignoring cost increases and inflation for the sake of simplicity in a back of the envelope analysis, and assuming a constant subscription rate of $50 per month per unit, or $60,000 a year (as above), over 22 years, the provider's total revenue stream would be $1.32 million. The allocable cost of $135,000 therefore represents about 10% of the provider's revenue. This is not an unreasonable figure, given that (i) the provider would have no revenue at all without access to the building; (ii) the owner is not receiving anything close to that amount; and (iii) the owner is bearing other costs, as well, as discussed above.

To be clear, the Real Estate Associations are not arguing that an allocated share of development costs is currently being recovered by owners. Nor are we arguing that owners

[107] In the case of a property with fewer units, the cost of the building would generally be reduced – but so would the amount of the fees paid by a provider.

should start trying to recover those costs in the future. We have two points in this regard. First, if the Commission had the authority to regulate what providers pay owners, and if it were to attempt to do so on the basis of cost, a fair and accurate regulatory scheme would take those costs into account, in some fashion. The method we have outlined above is an illustration of the problem and how it might be addressed. Second, the amount of compensation that owners currently receive does not come close to recovering all of the possible costs.[108] It certainly does not take into account a share of development costs. In practice, owners are concerned with defraying some portion of current expenses directly related to the provider's facilities. Furthermore, providers do not pay more than they think is reasonable in light of their return-on-investment calculations. These are freely negotiated amounts, in which the provider generally has the upper hand.

In fact, as our examples clearly illustrate, the fact is that providers simply do not pay owners very much either in absolute or relative terms. The Declaration of Kathleen Austin, Exhibit J to the *2019 Comments*, included a similar calculation based on actual figures from the portfolio of Equity Residential, at the time the second largest apartment owner in the United States. Door fees of $50 to $225, amortized over a ten-year agreement, pay Equity between $0.42 and $1.88 per unit per month. When seen in context, it is hard to believe that anybody would consider these figures to be unreasonable or in any way likely to distort the market or owners' incentives in way that would call for regulation. We can only conclude that certain providers have decided they have nothing to lose by asking the Commission to intervene in a highly competitive, functioning free market by giving them free or reduced cost access to property they do not own.

---

[108] Kok Decl. at ¶¶ 13-16.

4. Attempting To Regulate on the Basis of Owners' Costs Would Be Extraordinarily Complex.

As we have just outlined, a fair cost-based scheme would have to take into account numerous costs related to the services performed and materials provided by an owner in connection with the full range of tasks needed to plan, oversee, and perform the installation of wiring on the provider's behalf. Such a mechanism would also have to consider the owner's costs of operating and maintaining the underlying property, because those costs directly benefit the provider by ensuring that its subscriber base at the property does not diminish. And finally, owners are entitled to be reimbursed for some share of the capital cost of developing and constructing the apartment community. Cost-based regulatory schemes are inherently complex to develop and administer, which is one reason the Commission no longer engages in the practice even with respect to areas in which Congress has given it jurisdiction.

The Commission cannot rely on any sort of self-policing mechanism. The first step in the process would have to be determining which costs to consider in the calculation of alleged "above-cost" compensation. Once that was done, the Commission would have to be able to oversee the application of the mechanism in some fashion. This would include enforcement and dispute resolution. It is by no means clear that the Commission currently has the staff resources or the expertise to undertake these tasks.

Indeed, every attempt at regulation raises the possibility of unintended consequences. In this case, if fees were to be regulated on the basis of cost, owners would inevitably become much more aware of which costs are permitted to be recovered and presumably would try to recover them under the new mechanism. This is currently not an issue, and the parties simply agree on what they think is a reasonable share of the costs for the owner to absorb. But if certain costs are permitted and others are not, then incentives will shift to designating costs so they fit within the

Commission's rules. On the basis of an individual property, this may not seem to matter much because, as we have demonstrated, the amount of current cost recovery in a single transaction is relatively small. But for an owner with a large portfolio, recovering costs over the entire portfolio could be quite significant. Today that issue is handled by the market when contracts are negotiated. But if the Commission starts to rule on what is in and what is out that may change. Disputes could arise over what costs are to be included, within the scope of the new regulations. This is never an issue today, but it could lead to more protracted negotiations, or to matters being referred to the Commission.

Another possible consequence could be a reduced willingness on the part of owners to pay any costs. This would shift the full burden back to the provider, which in turn could make providers less willing to enter certain properties.

In other words, what some providers think would benefit them could actually have the opposite effect.

Nor could the Commission circumvent its lack of authority by claiming to regulate only the payments made by providers to property owners. It would be the costs of property owners that would be considered in any calculation and determining and verifying those costs would impose a direct burden on property owners. This proposal calls for the direct regulation of the real estate industry. Aside from being unnecessary, complex, and burdensome, it would be unlawful.

D. Exclusive Wiring Agreements Benefit Residents Because They Are Essential to the Effective Management and Use of Facilities by Providers.

In the *2019 Comments* and in Part III, above, the Real Estate Associations described how the Commission's inside wiring rules and fiber orders have created different incentives for

different classes of provider. Verizon and AT&T claim that their facilities are not subject to the cable inside wiring rules, and refuse to upgrade or install new facilities in any apartment building unless the owner agrees that all of the provider's facilities remain the property of the provider, all the way to the individual apartment units. Many competitive providers have the same policy.

In other words, when dealing with these providers, owners have no choice but to accept the fact that the provider will have the exclusive right to use the facilities, but because the property owner does not own the wiring, the agreements are not technically exclusive wiring agreements. These property access agreements may provide for payment of compensation if the owner is installing facilities or doing other work for the provider's benefit.

Only the cable MSOs enter into true exclusive wiring agreements, because, as we discussed above, only they appear to be subject to the Commission's inside wiring rules. In fact, exclusive wiring agreements are essential to ensuring that the cable MSOs are on a level playing field with the ILECs. Without such contracts, the cable companies could be forced to share wiring with competitors. This is highly undesirable not just for the cable operator but for the apartment owner and the residents, for the reasons discussed in Part III. These agreements also may provide for payment of compensation.

None of these agreements harm residents. All of them help residents by making a single provider responsible for maintaining wiring, which in turn helps assure high quality service. In combination, exclusive wiring agreements and the ILEC property access agreements also create a level playing field, in which all providers obtain the benefit of controlling the wiring they use and the obligation to bear all or some of the cost of installing and maintaining that wiring.

The *2021 Notice* also asks whether exclusive wiring agreements have any effect on the prices subscribers pay for service. They do not, because providers charge apartment residents

their standard rates for service.[109] For marketing and administrative reasons, it would make no sense for a provider to charge residents of a particular building a different rate.

The rights granted in exclusive wiring agreements also do not prohibit entry by competitors. The Commission has recognized that exclusive wiring agreements do not prevent competitors from serving a building.[110] A competitor must provide its own wiring or wireless transmission equipment in the building, but the fact that another provider has the right to use existing wiring does not harm the competitor, nor give the incumbent an advantage. What would create an unfair advantage would be to grant providers the right to use property paid for by others – whether owners or other providers – without paying for it themselves.

Banning or otherwise regulating exclusive wiring agreements, or attempting to require wire sharing, will not increase incentives for owners to bring in competitors. An owner can still grant one provider the right to use the owner's wiring, without compensation, and decide not to bring in a second provider. The owner still has an incentive to introduce a competitor, if possible, to satisfy resident demand, so a competitor can still get access – the point, however, is that the terms of the arrangement with the first provider do not alter the owner's incentives one way or the other. If a potential competitor convinces the owner of the value of its particular service offering, the owner will enter into an agreement with the competitor. In fact, the key question is always whether a competitor can show a property owner that its presence would add value in some fashion. Payments to the incumbent, and marketing rights and wiring rights of the

---

[109] The one exception to this is in the case of an agreement for bulk service, in which the owner negotiates a discounted rate.

[110] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rd 20235, 20235 (2007), n. 2.

incumbent, do not affect that calculation. If the owner sees that granting access to the competitor will be beneficial to residents, the owner will be inclined to do so, regardless of the terms of existing agreements. We know this because, once again, apartment residents have a choice of at least two providers in 79% of properties owed by the average survey respondent.[111]

Sharing of wiring may lower costs to competitors, and so in theory it could promote competition. But – aside from the practical problems and legal concerns discussed in Part III – mandating sharing will not induce owners to grant access to any competitor. Competitors still have to show that they add value, and sharing of wiring may reduce that value, because of the many problems that arise when providers share wiring. Thus, any kind of sharing scheme could actually reduce competition.

E. So-Called "Sale and Leaseback" Agreements Are Not a Significant Factor in the Marketplace Today.

The *2019 Comments* briefly addressed "sale and leaseback" agreements, noting that they are not a factor in the market.[112] This has not changed, and the Real Estate Associations do not foresee a scenario in which they will be ever useful to owners or providers. For the reasons we described in 2019, essentially all existing inside wiring that is not owned by one of the ILECs, a private cable operator, or another non-MSO competitor, is now owned by the property owner. This occurred over the course of time by operation of the Commission's rules.[113] The term is therefore outdated, irrelevant, and should not be used because it is misleading.

---

[111] *NMHC/NAA 2021 Broadband Survey.*

[112] *2019 Comments* at 74.

[113] *Id.* at 31-40.

To be perfectly clear, for the reasons we laid out in the *2019 Comments*,[114] there are fundamental differences between "sale and leaseback" agreements and the standard exclusive wiring agreements in use today. The term may be used loosely by some parties, but that does not mean that the usage is correct.[115] Property owners do not use the term because it does not apply to agreements that grant the right to use their wiring: There is no sale, nominal or otherwise, and therefore no leaseback. From the beginning of this proceeding some commenters have falsely insinuated – indeed, they have declared outright – that property owners were engaged in improper behavior. And yet those commenters have submitted no evidence to support their claims. Only vague anecdotes and speculation.

In any case, any attempt to regulate "sale and leaseback" agreements would have no practical benefit precisely because they are not a factor. If the Commission were to regulate them, while acknowledging actual practice in the market, current agreements between the MSOs and property owners would not be affected, because the wiring is the property of the owner from the beginning. Commission rules also would have no effect on wiring owned by the ILECs because they always retain control over their wiring.

Such an effort could cause harm, however, if crafted in a way that could be extended to the useful and entirely legitimate exclusive wiring agreements that are common today. Some parties might seek to take advantage of such a result, which would cause needless harm. The Real Estate Associations therefore urge the Commission not to attempt to regulate such contracts.

---

[114] *Id.* at 31-40, 74; 2019 AMLI Decl. at ¶13.

[115] The *NPRM* specifically states that "sale and leaseback arrangements" are a subset of exclusive wiring arrangements, "in which a provider sells wiring it owns to a building owner and then leases that wiring back on an exclusive basis." *NPRM* at ¶13.

F. Exclusive Marketing Agreements Are Not Anticompetitive and Need Not be Regulated.

Apartment owners enter into marketing agreements with all types of providers.[116] They are not required as a condition of granting access to a property, nor do they exclude other providers. In fact, exclusive marketing can benefit a smaller competitor by making its presence better known to residents.

The *2021 Notice* asks whether marketing agreements have the effect of creating *de facto* exclusivity. The premise of this question and the related arguments made by some providers is that, because owners are paid based on subscription rates, they have an incentive to deny entry to competitors. Of course, as we have seen, the amounts owners get paid are minuscule: a few thousand dollars a year. A 5% marketing fee generates far less revenue than the average rent on an apartment unit.[117] In other words, to accept this premise, one must believe that owners value that small amount of money over the risk of irritating and losing tenants who want a choice of providers.

In fact, because owners value tenant satisfaction, they frequently grant access to competitors even when there is an exclusive marketing agreement in place. The *NMHC/NAA 2021 Broadband Survey* found that the average respondent had at least two providers in 79 percent of its properties, and competition at properties subject to an exclusive marketing agreement with one provider is extremely common.[118]

---

[116] Marketing rights are not a feature of access agreements between broadband providers and owners of other types of property. *2019 Comments* at 63-64.

[117] *2019 Comments* at 80-81, Part IV(C), above.

[118] 2021 Avalon Bay Decl. at ¶ 2; Kok Decl. at ¶ 5-6; 2021 A. Smith Decl. at ¶¶ 6-7.

Furthermore, residents are not harmed by exclusive marketing agreements because competing providers are still able to reach potential customers at a property through marketing in all forms of media. Residents will hear about the existence of competitive alternatives from print, radio and television advertising – and most certainly from Internet advertising.

Nor do exclusive marketing agreements prohibit on-site staff from answering questions from residents about the availability of other services. They certainly do not prevent residents from talking to each other. Consequently, it is not difficult for residents to learn whether there is a competitive alternative in the general market or in their building. And if an owner does grant access to a second provider, it makes no sense for the owner to hide the fact. The owner may not be able to promote the competitor, but that would not mean the competitor's presence would be a secret.

The Commission should also consider that many owners prefer to enter into non-exclusive marketing arrangements with multiple providers at a property.[119] This is simply because the owner wants to make a choice of broadband providers available to residents and wants on-site staff to be able to market each provider's services so that residents can choose a provider that meets their needs and budgets.

Marketing agreements have no effect on price or service quality. As noted earlier, providers charge standard rates to all subscribers in a geographic area. Marketing rights also have no effect on service quality one way or the other. Providers must still convince residents to subscribe, and if there is an alternative provider in the building, residents will know. If a

[119] 2021 AMLI Decl. at ¶ 7; 2021 AvalonBay Decl. at ¶ 15; Kok Decl. at ¶ 9; 2021 Smith Decl. at ¶ 12; *See also* 2019 Hubacher Decl. at ¶8; *2019 Comments*, Declaration of Andrew Smith ("2019 A. Smith Decl." at ¶20; 2019 K. Smith Decl. at ¶16; 2019 Yeh Decl. at ¶17; 2019 Equity Residential Decl. at ¶ 16; 2019 AMLI Decl. at ¶ 18.

provider is doing a poor job, with or without marketing rights, residents will let the owner's on-site staff know and the owner will have every incentive to correct the problem. In this regard, property owners remain the best advocates for ensuring that their residents have access to reliable, high-speed broadband with a higher level of service than otherwise available in the broader community.

Finally, restricting a property owner's efforts to use its property to endorse a particular service provider would be an unconstitutional abridgement of commercial speech.[120] In fact, restricting a service provider from entering into an agreement and exercising the rights granted under an exclusive marketing agreement also would violate the First Amendment.[121]

V. ATTEMPTING TO IMPOSE MANDATORY ACCESS WOULD NOT PROMOTE COMPETITION.

The *2021 Notice* asks what effects mandatory access statutes have on competition, choice, and price in multi-tenant environments. Nothing has changed since 2019 and the arguments in the *2019 Comments* and *2019 Reply* are as powerful today as they were then.[122]

Mandatory access laws are inherently flawed. They grant a favored class of providers the right to serve apartment communities without obligating them to do so. Expanding those rights to include competitive broadband providers would do nothing to address the severe service disparities in smaller, low-income, and affordable properties, because providers can still choose where to go. Adopting federal mandatory access modelled on existing laws therefore would not help the nation in addressing the digital divide that has become all the more apparent throughout

---

[120] *2017 NOI Comments* at 8-9.

[121] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 569-71 (1980).

[122] *2019 Comments* at 75-77; *2019 Reply* at 26-27.

the pandemic. Millions of Americans and millions of apartment units located in unfavored areas remain underserved because broadband providers deem them unprofitable and therefore unworthy of needed investment. Addressing this deployment gap, not further rewarding cherry-picking by providers, should be the focus of policymakers at all levels of government.

The *2021 Notice* asks whether mandatory access statutes affect subscriber prices. The answer is that they do not, because providers set rates on a regional or national basis and do not distinguish between subscribers based on the type of housing in which they reside. Furthermore, while we do not have specific evidence on this point, the Real Estate Associations believe that there may be less competition and choice in states with mandatory access statues because in some circumstances they discourage entry by competitive providers. We will address this point further below, but first we will explain why the Commission cannot adopt a federal mandatory access scheme.

A. The Commission Has No Statutory Authority To Grant Broadband Providers Access to Private Property and Any such Attempt Would Constitute a *per se* Taking Under the Rule of *Loretto*.

The Commission has no authority to impose any kind of mandatory access. The cable inside wiring rules and the ban on exclusive access were both grounded in specific sections of the Communications Act, and both rules regulate providers, not owners. In this instance, there is no applicable statute, and the Commission has no authority to require owners to permit access to their properties. Even if the Commission reasserts authority over broadband service, it will not be able to reach property owners.

There is a statute that allows cable operators to install facilities in public rights-of-way and "easements . . . dedicated for compatible uses."[123] Section 541(a)(2) is instructive because its legislative history and the decisions of the courts that have interpreted it make very clear that the Commission would face insurmountable hurdles if it tried to grant broadband providers the right to install facilities within an apartment community without the owner's consent.

Five Courts of Appeal – the Third, Fourth, Eighth, Ninth, and Eleventh – have ruled on cases in which a cable operator cited Section 541(a)(2) in seeking to obtain access to apartment buildings. Although their analyses have differed in certain respects, all five courts have held that Congress did not intend to grant access over the objections of a property owner.[124] The courts recognized that what cable operators were asking for raised the threat of violating the Takings Clause of the Fifth Amendment and the Supreme Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982). Any attempt by the Commission to adopt an analogous rule would also violate the Fifth Amendment.

Two of these opinions are especially relevant, when considering the question of the Commission's authority: *Woolley* and *Century Southwest Cable Television v. CIIF Assocs*., 33 F. 3d 1068 (9th Cir. 1994) ("*Century Southwest*").

---

[123] 47 U.S.C. § 541(a)(2) ("Section 541(a)(2)").

[124] *Cable Arizona Corp. v. Coxcom, Inc*., 261 F.3d 871, 874 (9th Cir. 2001); *Century Southwest* at 1071 (9th Cir. 1994); *TCI of North Dakota, Inc. v. Schriock Holding Co*., 11 F.3d 812, 813 (8th Cir. 1993); *Media General of Fairfax v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169, 1173 (4th Cir. 1993); and *Woolley*, 867 F.2d at 155-59. In a recent decision dealing with access to an exterior electric easement, the Seventh Circuit distinguished those cases, but noted that "[t]he problem for the cable operator in those cases was that the owners had not dedicated their land for telecom uses." *West v. Louisville Gas & Elec. Co*., 951 F.3d 827, 831-32 (7th Cir. 2020). Another problem related to wiring easements inside buildings is that they typically only extend to the actual physical location of the wiring. An existing grant cannot be expanded to permit installation of additional wiring owned by a third party. *Cable Associates Inc. v. Town & Country Management Corp*, 709 F. Supp. 582, 586 (E. D. Pa. 1989).

Woolley undertook an extensive analysis of the legislative history of Section 541(a)(2), noting that an early version of the 1984 Cable Act contained a separate mandatory access provision, which would have barred the owner of any residential or commercial building or manufactured home park from preventing or interfering with "the construction or installation of facilities necessary for a cable system . . . if cable or other communications service has been requested by a lessee . . . ."[125] This provision, which also would have empowered the Commission to adopt regulations providing for just compensation to the property owner, was stripped from the bill. Consequently, there is no federal grant of mandatory access. In addition, given that Congress specifically considered giving the Commission rulemaking authority but ultimately declined, the probability that the courts would approve of any attempt by the Commission to assign itself such authority is undoubtedly low.

In *Century Southwest*, the Ninth Circuit stated:

> A vague and general desire to promote competition is not a reason to permit the physical invasion of property. It is established law that the intrusion of a cable service onto rental property is a taking of the property, which can only be carried out by public authority for just compensation.[126]

This statement encapsulates the problems that would arise if the Commission were to proceed with many of the proposals put forth in this docket. Congress has never granted the Commission the power to order a taking of the property of apartment owners or to order payment of compensation. Without such express authority from Congress, it is extremely unlikely that the courts would uphold any attempt by the Commission to order the *per se* taking of private property.

---

[125] *Woolley*, 867 F.2d at 155-58.

[126] *Century Southwest*, 33 F.3d at 1071 (*citing Loretto*).

B. State Mandatory Access Laws Do Not Advance Competition and Might Actually Hinder It.

There are seventeen true mandatory access jurisdictions, seven of which grant rights only to cable operators.[127] All seventeen require the provider to bear the cost of installing its own facilities, either expressly or because they grant only an access right and say nothing further about installation costs. The District of Columbia and New York also provide for the possibility that a tenant would bear the cost of installation.

As the Real Estate Associations have noted,[128] the fact that two-thirds of the states have not adopted similar legislation combined with the fact that service by cable operators in apartment buildings is ubiquitous, is strong evidence that they were not needed to encourage deployment. Furthermore, mandatory access statutes do not actually mandate deployment:

---

[127] Exhibit K consists of a table listing and summarizing the key terms of the various state laws often designated as "mandatory access statutes." Seven jurisdictions (DC, IL, MA, NJ, NY, PA, WV) effectively obligate property owners to allow cable operators to install facilities to serve residents of an apartment building and establish procedures for a provider to obtain access. Two (NV and WI) follow the same model but apply to providers of "video service." Four more (CT, ME, MN, RI) include providers of cable service and at least one additional class of service. Three states (DE, IA, OH) grant cable operators the same right to install facilities on private property as telecommunications companies and have been interpreted to permit access to buildings. Finally, Kansas simply provides that an owner may not "interfere with or refuse to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality."

Three other states are often listed as mandatory access states but in fact are not. The Texas statute and regulations only apply to telecommunications providers and are not commonly used or understood to grant mandatory access rights to video or broadband providers in residential properties. Texas Utility Code §§ 54.259 – 261; Texas Administrative Code §26.129. The Florida statute only applies to condominiums. Fla. Stat. Ann. § 718.1232 (2021). And the Virginia statute addresses certain types of compensation but does not require a property owner to permit access at all. Va. Code Ann. § 55.1-1222.

[128] *2019 Comments* at 75.

providers have no obligation to serve any particular location and they retain discretion to pick and choose based on their own criteria.

Even if mandatory access rights were extended to all broadband providers, there would be no guarantee of increased deployment, because the competitive providers would also have discretion about where to serve and would have to bear the cost of installing their own inside wiring. Under current market conditions, competitive providers are granted access to apartment buildings because the provider has made the case for the value of its presence. The parties negotiate the terms of access, which, as we have described, often provides for the property owner to bear a substantial share of the installation cost. In a mandatory access situation, this does not occur, in part because the statutes put the burden on the provider – but also because the owner has no reason to cooperate when it had no choice about the provider's entry. In fact, as a general matter, business relationships work better when both parties agree to the terms and see the benefit of cooperation. Common sense tells us that when one party uses force or the law to get its way, the other party is unlikely to consider the relationship to be beneficial or in its interests.

There is no reason to believe that any future access scheme would work any better: Owners would have no reason to voluntarily pay any of the cost of installation. If owners stop subsidizing providers, the result could therefore be less deployment rather than more. Or there could be even more cherry-picking by competitors to get into high-end properties, leaving less deployment and competition in underserved areas.

Current mandatory access laws also probably reduce deployment for another reason. A competitive provider never knows when the franchised cable operator or another company with mandatory access rights might choose to enter a building it is serving. A competitive provider, in negotiating with the owner of an existing property served by the incumbent cable MSO, can

assess its risk reasonably well. But under mandatory access, if the building is under construction, or for whatever reason the MSO has not previously elected to serve it, the competitive provider can never be sure whether the cable operator will choose to enter in the future. If the cable company does come in, the competitor's return on investment calculations could be rendered completely invalid. A broad rule granting mandatory access to all providers would cause even more harm, because every provider would have to hedge its bets.

In any event, extending mandatory access rights is unlikely to increase competition broadly across the rental housing sector because so many buildings are already served by two providers. A competitor could obtain access, but in a large majority of properties it would then have to pay installation costs and compete with not one but two or more providers. This would only make sense at the top of the market, where residents are able to pay the most for service and therefore will pay for higher speeds. In buildings with one provider, there might be a modest increase in competition – but this is pure speculation. The primary limiting factor will always be how attractive a building is to the provider, because building owners are trying to attract good quality service, not turn it away. The reality is that providers advocating for mandatory access are not interested in expanding service or competition where it is really needed – their goal is to obtain access to subscribers in luxury and Class A buildings where there is already ample competition.

VI. THE REAL ESTATE AND MULTIFAMILY INDUSTRIES ARE ACTIVELY ENGAGED IN FINDING WAYS TO EXTEND COMPETITION AND IMPROVE SPEEDS AND SERVICE QUALITY IN PUBLIC, AFFORDABLE, AND LOW INCOME HOUSING, AND OTHER UNDERSERVED PROPERTIES.

The *2021 Notice* asks whether the size of a property bears on the issues under consideration in this proceeding, suggesting that the Commission might regulate agreements related to properties above a certain size, while exempting smaller buildings from those rules. [129] It appears that the Commission may have misconstrued earlier comments, which noted that owners of smaller properties often have trouble attracting competitive broadband service. The Real Estate Associations believe that the real issue that needs to be addressed is that there is a significant class of underserved properties, of which certain smaller properties are a subset. These communities are underserved for a variety of reasons, but the fundamental problem is that providers prefer to invest their capital elsewhere. Size can be a factor, but it is not the only factor, and in some cases it is not a factor at all. For instance, a 40-unit, 50-year old apartment building in Chevy Chase, Maryland, may very well have high speed service from two or more

[129] The *2021 Notice* cites an *ex parte* notice filed on behalf of the Real Estate Association for the proposition that "one-size-fits all regulation" would be inappropriate because of differences in the sizes of MTEs. To be clear, in context, the reference to "one-size-fits-all" was directed at the overall scope of this proceeding and the confusion and conflation of issues arising from the attempt to address the very different arrangements that exist in the residential, office, and retail markets. With respect to size, the cited notice stated that the effective burden of new regulation would fall on larger companies that already aggressively pursue competitive options, thus hindering deployment; new rules would have less effect (if any) on smaller owners and properties because it is more difficult for them to attract competitors. In other words, regulation will not help small properties, but relieving them of those regulations will not help them either. The *2021 Notice* is looking at the problem through the wrong lens.

In addition, actually defining a "small MTE" has proven extremely difficult and impractical in other contexts. There is no recognized or widely-agreed upon definition of what a "small MTE" really is. In the apartment market, depending on the ownership structure of the property, this can mean a duplex, a four-family home, or even 50+ apartment homes in a garden-style community.

providers, whereas an identical building in Baltimore is more likely to have lower speed service from a single provider.

In other words, there is a digital divide: Some properties and some communities do not have access to the same level and quality of service as those that were described in Part II of these Further Comments.[130] In other words, there are real limitations to service and those limitations occur most frequently in underserved areas where providers have not invested in broadband expansion and are reluctant to invest further. Lower income communities and rural areas in particular have trouble attracting both competition and high speed, high quality service. Various government programs have been instituted and expanded to address these issues, especially since the onset of the pandemic, but they may not always be sufficient.

These disparities are relevant to the issues posed by this proceeding for two reasons. First, many properties in these underserved areas consist of affordable housing or public housing communities subject to Department of Housing and Urban Development ("HUD") regulations. The multifamily industry is very much aware of the needs of these communities and is actively working to address those needs wherever possible, within the parameters of existing law.

Second, other properties, which are privately-owned but are not HUD-subsidized despite being considered affordable housing, also have trouble attracting the investment needed to introduce higher speeds or competition or both. Their residents may not always be considered low income, but by virtue of a combination of size, location, and income level this type of

---

[130] To the extent that the references to "small MTEs" in the *2021 Notice* are meant to include commercial buildings, the Real Estate Associations again would point out that there is little evidence in the record to date that competition in commercial market is even remotely a problem. In any case, the same principle applies here as in the apartment market: owners of smaller office buildings and retail centers in less desirable areas are less likely to enter into agreements that provide for compensation and more likely to have trouble attracting competition. Exempting them from new regulations would not solve the problems they face.

apartment community faces much the same challenges as affordable and public housing. Competitive alternatives do not exist because competitors either have no facilities in the vicinity or because the property does not meet their investment criteria. The fundamental problem is that providers of all kinds cherry-pick. Only the cable MSOs (and sometimes the ILECs), under the terms of local cable franchises, have any affirmative obligation to serve a property upon request. Competitive providers are entirely free to pick and choose, and for an obvious reason – economy of scale – larger properties on average are more attractive to providers.

In other words, the challenges these properties face do not arise because the owners have entered into the kinds of agreements under review in this proceeding, but because the potential return on the provider's investment is not sufficient to warrant interest in the property. For example, the providers that do agree to serve them (again, typically the local cable franchisee) might have the right to use existing wiring, but they do not agree to pay any fees to the owner. The owner is not in a position to bargain in these cases and any contract is likely to be an "access-only" grant of a right of entry, using the provider's one-sided standard form agreement. As a consequence, infrastructure in such buildings is often substandard, with harmful effects on service quality.

Multifamily firms involved in the development and operation of the various types of properties just described want to fully and fairly meet the needs of that market, but finding service providers who are willing to serve such properties can be an enormous challenge. Despite the best efforts of owners, residents of these properties are therefore left with limited service options and limited speed. We cannot emphasize strongly enough that the terms of building access are not the problem here and regulation of the kind proposed in this proceeding will not solve the actual problem. The solution will come from broadband providers that are willing and

able to reach underserved sectors of the market rather than merely grabbing the low-hanging fruit in more profitable communities.

Another problem at the consumer level is that affordability of service remains an obstacle to adoption. Here, again, it is the cost of extending infrastructure and delivering service, rather than the terms of access, that determine what consumers must pay. Even where owners are successful in luring several service providers to such a property, in far too many cases, low-income Americans are unable to connect.

Solving the stubborn problems of the digital divide and expanding deployment and adoption of broadband is no easy task and cannot be shouldered by any one party. Solutions will require collaboration and partnerships between a variety of stakeholders including policymakers, property owners, and service providers. If there is a place for government regulation it is for policies that will directly promote deployment in rural areas and to affordable and low-income communities, and upgrading of existing broadband infrastructure in middle- and low-income housing across the nation. Improving service quality and extending competition to many of these buildings may only be possible through a mandate on providers, perhaps coupled with funding for the necessary infrastructure.[131] We are not advocating such an approach – but as long as providers can choose where to go, they will go where the money is. This may be entirely reasonable, but it is important for the Commission to acknowledge that provider economics, not

[131] We note there that in the larger market, as we have discussed at length, property owners fund a large share of infrastructure inside buildings. In the underserved market, property owners typically cannot afford such an investment for the same reason providers are unwilling to undertake the expense. The revenue generated from rents may be insufficient, after accounting for existing expenses, to allow the owner to absorb the additional costs of new broadband infrastructure.

the actions of property owners and managers, ultimately dictate the level of deployment and competition.

Instead, the competitive broadband providers – with occasional exceptions -- are asking for help to become the third and fourth option in wealthy communities. If the goal is to get competitive, affordable broadband options to every American, the proposals in this proceeding are not the way to do it.

VII. TRANSPARENCY REQUIREMENTS WOULD BE UNNECESSARY, CUMBERSOME, AND INEFFECTIVE.

The *2021 Notice* again asks about transparency requirements, such as disclosure of the terms of exclusive wiring or marketing agreements or disclaimers. The Real Estate Associations addressed these questions in response to the NPRM.[132] We noted then that transparency requirements are unnecessary, because the purported harm does not exist, poorly-designed disclosure requirements could discourage providers from entering into otherwise lawful and useful agreements, and disclosure of terms would be of no actual benefit to consumers. The terms of agreements between broadband providers and apartment owners have not changed in the last two years, nor have the issues presented by those agreements. Therefore, there is no need to refresh the record on this point.

The Real Estate Associations, however, do wish to emphasize that transparency rules requiring the disclosure of contract terms to the residents would constitute a mandate from the government that the property owner or broadband provider or both communicate with the residents. Setting aside for the moment the question of whether the Commission has the statutory authority to compel a property owner to take such a step, such a requirement would

---

[132] *2019 Comments* at 89-92; *2019 Reply* at 25-26.

raise a significant risk of violating the First Amendment rights of any private entity required to make the disclosure. It is impossible to assess that risk at the moment, because neither the *NPRM* nor the *2021 Notice* have described in any detail how the disclosure requirement might work. But in cases addressing mandatory disclosures the Supreme Court has held that the agency must be able to identify a substantial interest that would be advanced by the particular disclosure required. [133] In this case, for example, it is not at all clear that informing tenants that the property owner receives certain payments would be of any benefit at all to those tenants. Disclosure would not affect their service quality, their service choices, or their rates. Any connection between disclosure and deployment by a competitor (which is the issue here) is purely speculative and by no means a logical consequence or evident. Therefore, the Commission would have no substantial interest in requiring that tenants be told that the owner has been paid in return for granting a provider the right to use the owner's wiring. This analysis would have to be applied to each kind of disclosure the Commission might consider adopting.

Consequently, we again urge the Commission not to adopt any disclosure requirements.

VIII. THE COMMISSION CONTINUES TO LACK LEGAL AUTHORITY TO REGULATE AGREEMENTS BETWEEN PROPERTY OWNERS AND BROADBAND PROVIDERS.

The legal landscape has not changed since 2019. The Commission has no authority to regulate any of the agreements under consideration in this proceeding, for the reasons stated in the *2019 Comments* and the *2019 Reply*.[134]

---

[133] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 564 (1980) (restriction on commercial speech must directly advance state interest); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (requiring substantial relation between governmental interest and information required to be disclosed).

[134] *2019 Comments* at 42-52; *2019 Reply* at 3-11.

Even if the Commission were to reassert authority over broadband service in a future proceeding, its power to adopt any of the proposed measures would be severely limited. None of the statutes cited in the *NPRM* extends the Commission's jurisdiction to include owners of real property. The Commission has no statutory authority to establish a standard for what constitutes effective competition inside buildings, and even if it did it could not apply that standard to property owners.

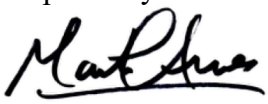
Finally, the various proposals raise significant issues under two provisions of the Bill of Rights. The Commission is barred by the Fifth Amendment from mandating access to private buildings, as well as the sharing of wiring that belongs to building owners. Congress has not authorized the Commission to attempt to take such property, nor has it provided a means of compensating owners. And the Commission cannot regulate the terms of marketing agreements or impose disclosure requirements without violating the First Amendment commercial speech rights of both owners and providers. The Commission cannot rely on a "vague and general desire to promote competition" to justify any action that would affect the constitutional rights of property owners.[135]

[135] *Century Southwest,* 33 F.3d at 1071 (*citing Loretto*).

CONCLUSION

For all the foregoing reasons, the Commission should refrain from adopting any further regulation affecting broadband deployment in the multiple tenant environment market.

Respectfully submitted,



Matthew C. Ames
Marci L. Frischkorn
HUBACHER AMES & TAYLOR, P.L.L.C.
11350 Random Hills Road
Suite 800
Fairfax, Virginia 22030
(703) 279-6526

October 20, 2021

EXHIBIT A

The Real Estate Associations

The Council for Affordable and Rural Housing (CARH):

CARH is a national industry trade association with headquarters in Alexandria, Virginia. For over 40 years, CARH has represented the interests of for-profit and non-profit builders, developers, management companies, and owners, as well as financial entities and suppliers of goods and services to the affordable rental housing industry in rural communities throughout the country.

The Institute of Real Estate Management ("IREM"):

IREM® is an international institute for property and asset managers, providing complete knowledge to take on real estate management's most dynamic challenges. That means knowledge prepared for the day-to-day *and* the one-of-a-kind: from solving the latest tenant crisis to analyzing market conditions.

For over 85 years, our members have made us the world's strongest voice for all things real estate management. Today, almost 20,000 leaders in commercial and residential management call this home for learning, certifications, and networking.

ICSC

ICSC represents the Marketplaces Industry, the places and spaces where people shop, dine, work, play and gather. ICSC supports our members in their vital roles as community builders, career developers, job creators and economy drivers. Our members include property owners, developers, financial institutions, professional service providers and, importantly, marketplace tenants such as retailers, restaurants, gyms, child care providers, health care and wellness centers. These businesses comprise an essential part of every city, town and village across the country, with small businesses representing nearly 70% of marketplace tenants.

The Marketplaces Industry is an essential component of American communities, with an estimated $6.7 trillion of annual pre-COVID consumer activity produced by the retail, food & beverage, entertainment and consumer service industries occurring within America's marketplaces, and nearly 1 out of 4 American jobs is retail related. Approximately $400 billion of all state and local taxes supporting schools, public safety re-sources and infrastructure was generated by our industry in 2019.

Nareit:

Nareit serves as the worldwide representative voice for REITs and real estate companies with an interest in U.S. income-producing real estate. Nareit's members are REITs and other real estate companies throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

The National Apartment Association ("NAA"):

The National Apartment Association (NAA) serves as the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of 149 state and local affiliates, NAA encompasses over 93,000 members representing more than 10.5 million apartment homes globally. NAA believes that rental housing is a valuable partner in every community that emphasizes integrity, accountability, collaboration, community responsibility, inclusivity and innovation.

The National Leased Housing Association ("NLHA")

NLHA is widely recognized as the only national organization serving all major participants--private and public--in the multifamily rental housing field. NLHA is a vital and effective advocate for nearly 500 member organizations, including developers, owners, managers, public housing authorities, state housing finance agencies, local governments, investment bankers, attorneys, accountants, architects, non-profit sponsors and syndicators involved in government related rental housing. This unique coalition is committed to public and private sector interaction as the most pragmatic means of meeting this nation's rental housing needs. Though NLHA's constituencies are many, the goal of

the Association is one: the provision and maintenance of decent, affordable rental housing for all Americans, particularly those of low and moderate income.

The National Multifamily Housing Council ("NMHC"):

Based in Washington, D.C., the NMHC is a national nonprofit association that represents the leadership of the apartment industry. Our members engage in all aspects of the apartment industry, including ownership, development, management and finance, providing apartment homes for the 39 million Americans who live in apartments today and contributing $1.3 trillion annually to the economy. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Over one-third of American households rent, and nearly 19 million U.S. households live in an apartment home (buildings with five or more units).

The Real Estate Roundtable ("RER"):

RER brings together leaders of the nation's top publicly-held and privately-owned real estate ownership, development, lending and management firms with the leaders of major national real estate industry trade associations to jointly address key national policy issues relating to real estate and the overall economy. By identifying, analyzing, and coordinating policy positions, The Roundtable's business and trade association leaders seek to ensure a cohesive industry voice is heard by government officials and the public about real estate and its important role in the global economy. Collectively, RER members' portfolios contain over 12 billion square feet of office, retail and industrial properties valued at more than $2 trillion; over 1.5 million apartment units; and in excess of 2.5 million hotel rooms. Participating trade associations represent more than 1.5 million people involved in virtually every aspect of the real estate business.

EXHIBIT B

Declaration of AMLI Management Company

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Competitive Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF AMLI MANAGEMENT COMPANY IN SUPPORT OF FURTHER COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Jason Knutsen, declare as follows:

1. I submit this declaration in support of the Further Comments of the Real Estate Associations in response to the Commission's Public Notice dated September 7, 2021, in the above-captioned matter.

2. I currently serve as SVP and Chief Information Officer for AMLI Management Company ("AMLI"), the 43rd largest apartment owner in the United States, according to the National Multifamily Housing Council's most recent survey data. *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at: https://www.nmhc.org/research-insight/the-nmhc-50/top-50-lists/2019-owners-list/

3. I have served as SVP and Chief Information Officer since June 2021 and before that as VP, IT Infrastructure since 2014. I have 7 years of experience in the delivery of video, broadband, and other communications services in multitenant environments and over 20 years' experience in the delivery of internet and broadband in commercial environments. In my role at AMLI, I am responsible for telecom and broadband agreements, IT Operations, and Cybersecurity.

4. AMLI currently owns and operates a total of 77 apartment communities, comprising 25,545 units, located in 7 states.

5. The typical AMLI community has at least two broadband vendors available to residents in markets where such competition exists. These vendors typically include the local franchised cable operator, the local telephone company's broadband product, and sometimes a third independent internet service providers (ISPs"). In fact, 88.3 % of our communities have two broadband vendors available, and 19.5% have three or more.

6. AMLI enters into marketing agreements with all types of providers. We do not require it as a condition of granting access to a property. In a typical marketing agreement, we agree to do the following things: Distribute marketing materials to residents and allow and coordinate access for on-site marketing events. In return for assisting with marketing their service, the providers will typically pay some type of compensation to us. Often this compensation is a percentage of the provider's recurring revenue it collects from its subscribers at the building. The percentage of revenue shared increases as the provider's penetration rate increases. The revenue share in the contract can range from zero to 8 or 10%, depending on the provider's penetration in the building; in reality, however, the amount we actually receive typically falls in the range of three to six percent, because the higher penetrations required for the provider to pay the higher percentages are not reached. The amount of compensation providers have been willing to pay has gone down over time, and although the amount of the revenue share is negotiable, the maximum amount they will pay depends largely on their internal policies, rather than on our negotiation demands.

7. AMLI seeks bulk internet arrangements on new property developments. We strive to offer premium internet services at new properties at below market rates for our future residents. At properties without bulk arrangements, we seek to enter non-exclusive marketing

arrangements with multiple providers at a single property whenever possible. We strive to make a choice of broadband providers available to residents and we want our on-site staff to be able to market each providers' services so that residents can choose a service from the provider of their choice that meets their needs and budgets. Thus, whenever possible we try to enter only non-exclusive marketing arrangements. Even though the financial offers from service providers are far less rewarding for non-exclusive marketing agreement than exclusive marketing offers, our higher priority is letting our residents know that there is a choice of broadband providers available. In fact, 89.3% of our (non-bulk) communities have only non-exclusive marketing contracts in place while only 10.7 % have an exclusive marketing contract.

8. The following table describes in detail the types of providers and agreements that AMLI currently has in place at all of its communities, excluding properties at which broadband service is available on a bulk basis:

Table 1: Types of Agreements in All Apartment Properties Owned or Managed by AMLI, excluding bulk

	Number of Properties	Percentage of Portfolio	Number of Properties	Percentage of Portfolio
Properties with one broadband provider	8	10.7%		
Exclusive wiring rights			8	10.7%
Use of owner wiring			0	
Use of provider wiring			8	10.7%
Exclusive marketing rights			6	8.0%
Properties with two broadband providers	52	69.3%		
Exclusive wiring rights			52	69.3%
Use of owner wiring			25	33.3%
Use of provider wiring			27	36.0%
Exclusive marketing rights			2	2.7%
Properties with more than two broadband providers	15	20.0%		

Exclusive wiring rights	[redacted]		15	20.0%
Use of owner wiring			12	16.0%
Use of provider wiring			3	4.0%
Exclusive marketing rights			0	0.0%
TOTAL number of properties	75	100	[redacted]	

9. Our most important goal in negotiating agreements with broadband providers is to give residents access to high quality service. To that end, we have begun solicitating bulk arrangements on new property developments. The bulk services will provide residents with at least 1 Gbps symmetric service and have assurances to upgrade to higher speeds if in the future higher speeds are competitive in that market. Prior to this year, our belief had been that if we had at least two providers servicing the same property, both with non-exclusive marketing agreements, that both providers would upgrade and maintain their facilities to compete for subscribers. In most cases this has held true, but in multiple instances where one provider held a significant subscriber advantage due to a superior service offering the other provider has elected to forgo improvements to their facilities and upgrade their service offerings.

10. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 12th day of October 2021, at Chicago, IL.

DocuSigned by:

66B4D4E30824449...

Jason Knutsen

EXHIBIT C

Declaration of AvalonBay Communities, Inc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF AVALONBAY COMMUNITIES, INC., IN SUPPORT OF FURTHER COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Alaine Walsh, declare as follows:

1. I currently serve as Senior Vice President, Operations & Investment Services, for AvalonBay Communities, Inc. ("AVB"), the fourth largest apartment owner in the United States and the 13th largest apartment manager in the United States, according to the most recent survey data compiled by the National Multifamily Housing Council. In this position, I am responsible for coordinating management and delivery of television service, telephone service, and broadband Internet service (collectively, "communications services") to AVB communities.

2. At the typical AVB community, at least two broadband service providers offer broadband service to residents. These broadband service providers include a combination of the local franchised cable multiple system operator ("MSO"), the incumbent local exchange carrier ("ILEC"), and/or one or more independent internet service provider ("ISPs"). Ninety-one percent of AVB's communities are served by at least two broadband service providers. Where only one broadband service provider serves an AVB community, it has historically been due to the unavailability of a second broadband service provider that is able to provide at least 50-100 Mbps broadband service at the community.

3. Nearly all AVB communities are served by the MSO for the market area, as

these providers have ubiquitous networks and a large and heavily advertised presence in the market area. In rare instances, AVB has developed a community where the MSO would not provide managed Wi-Fi communication services; at other communities, the MSO did not serve the community at the time AVB purchased the community.

4. Most of AVB communities are served by the ILEC, particularly where the ILEC is able to deploy fiber-based broadband service. Sometimes an ILEC has refused to extend fiber-based broadband service to a new construction community, and ILECs have routinely refused to upgrade legacy copper facilities to fiber, leaving those communities with low-speed Internet services that may or may not meet the minimal FCC definition of "broadband service." Historically, ILECs have declined to deploy fiber based broadband service at over 50 AVB communities containing more than 13,000 apartment homes in five states, citing various discretionary justifications, including a lack of available funding in the ILEC's budget, the ILEC lacking a video franchise in the market area of the community, or the ILEC's unwillingness to deploy fiber unless AVB incurs all of the ILEC's costs for deployment.

5. ISPs increasingly present a good alternative for broadband service, but their broadband service is often only available within limited service footprints. At many AVB communities, no competitive ISPs exist to provide broadband service. AVB is open to broadband service from ISPs, whether delivered via fixed wireless or fiber-based facilities, and AVB has entered into service agreements with ISPs to serve many AVB communities. For example, ISPs are widely available in AVB's Pacific Northwest market, where 71% of AVB communities are served by an ISP. AVB also has communities served by ISPs in California and Maryland and is currently evaluating service proposals from multiple ISPs for broadband service in numerous AVB markets. There have been many instances where AVB requested broadband service proposals from an ISP and the ISP ultimately declined to serve for a host of reasons, including failure of the proposed deployment to meet the ISP's internal rate-of-return requirements, a lack of fiber or line-of-sight transport options, or the community residing outside

the ISP's current footprint.

6. The Improving Competitive Broadband Access to Multiple Tenant Environments Notice of Proposed Rulemaking raises questions about exclusive wiring usage arrangements between property owners and service providers. In AVB's experience, exclusive wiring arrangements exist because the shared use of wiring by multiple service providers results in service issues for residents and operational problems for property owners. Simply put, competing service providers consistently demonstrate an inability to properly share wiring. Providers do not have accountability and resort to finger pointing when wiring is shared, creating service and reliability challenges for both residents and owners.

7. There are many examples demonstrating the problems resulting from service providers sharing wiring. For example, when a resident changes service from Provider X to Provider Y, a technician for Provider X will cut the connector off the ends of the wiring (claiming the connector constitutes the property of Provider X) and then Provider Y's technician arrives and tells the resident that the "owner's wiring" is damaged but the technician can either (i) fix it for a fee to be paid by the resident or(ii) the resident can wait for the property owner to fix the damaged wiring at some point in the future.

8. Either way, the resident sustains unwarranted repair fees or delayed service activation. Eventually, the repeated truncation of the wiring causes the wiring to become too short for use, and then it must be replaced, most often at the expense of the property owner. After suffering through years of these types of problems due to the shared use of wiring, industry members realized that allocating dedicated wiring to individual service providers eliminates most of the problems. Allocating dedicated wiring to individual providers also means service providers will assume responsibility for the maintenance and repair of that dedicated wiring, and some service providers will also agree to upgrade that dedicated wiring as needed over time, thereby "future proofing" the wiring. Almost immediately after allocating separate wire for use by each service provider, service providers proved able to promptly resolve wiring

problems on installation day because the service provider is responsible for the wiring and will not be compensated for a second truck roll. Residents no longer suffered service delays and wiring repair fees. And property owners no longer incurred the blame for "damaged wiring" or the expense of repairing damaged wiring caused by service providers.

9. Over time, service providers began to request the exclusive right to use certain wiring to avoid these operational challenges and reduce their costs to serve the property. Property owners then began incurring increased costs to either (i) install multiple sets of wiring for multiple service providers, or (ii) accommodate multiple service providers' desire to install their own wiring for their own use.

10. Reliable connectivity is not only of great importance to residents, but it is also critical to each community's operational network over which property owners provide enhanced resident services such as e-locks and smart homes. AVB bears the cost of this wiring, and any sharing of this wiring would create operational problems in the future, including concerns with security and life safety. Increasingly, owner-operated devices (i.e. electronic access, leak detection and energy-saving temperature control) are connected within apartment homes and require continuous connectivity to function. Any interruption from mandatory shared wiring would disrupt these technologies and at the very least discourage AVB from investing in new technologies and enhancing the resident experience if providers could assume control of that wiring at any time.

11. Many years ago, the ILEC would install its entire "phone system" and the MSO would install its entire "cable system" at no cost to property owners. The phone system and cable system consumed little or no electricity. The cost to AVB was virtually nil. Today, AVB incurs a large amount of the deployment expenses that used to be absorbed by service providers, including ever-growing monthly electricity expenses to power service providers' electronic equipment.

12. Today, at new construction communities, AVB pays for some or all of the

following items: engineering and system design review; trenching for conduit; installation of conduit for the service provider's distribution plant; space in the main communications room ("MDF") for installation of service provider electronics; electricity in the MDF for service provider electronics; conduit from the MDF to each intermediate communications rooms ("IDF(s)"); space in each IDF for installation of service provider electronics; electricity in each IDF for service provider electronics; installation of wiring from IDFs to each unit; installation of a distribution panel in each apartment home to house the service provider's equipment; electricity inside each distribution panel for service provider's equipment; and wiring from the distribution panel in each unit to the faceplates within each apartment home for service providers use. AVB also pays labor costs for installation of all of these items, labor costs for oversight of the installation of the service provider's facilities and electronics, and for the electricity consumed by service provider's electronics. This is done for every single service provider, whether ILEC, MSO, private cable operator ("PCO"), or ISP. It is not uncommon for AVB to be asked to install, from each IDF to the distribution panel in each unit, a bundle of wiring consisting of twisted-pair wiring, coaxial cable (sometimes multiple runs to accommodate both cable television and satellite), microduct (one for each fiber-based service provider), and an empty conduit (to accommodate wiring for future service providers).

13. Today, at existing construction communities, AVB routinely pays for the following items, particularly when any system upgrades are necessary: engineering and system design review; space in the MDF for installation of service provider electronics; electricity in the MDF for service provider electronics; space in each IDF for installation of service provider electronics; electricity in each IDF for service provider electronics; installation of electric receptacles inside distribution panels inside each apartment home; electricity inside each distribution panel to power the service provider's equipment; labor costs to provide security to accompany the service provider into occupied apartment homes for installation work; labor costs for oversight of installation of the service provider's facilities and electronics; and electricity

consumed by service provider's electronics.

14. AVB is unaware of any data showing that marketing agreements inhibit competition. AVB has entered into marketing agreements with all types of service providers. In a typical marketing agreement, AVB has agreed to provide residents with marketing collateral at the time of lease execution and/or move, make available service provider phone numbers and/or on-line ordering options to facilitate the ordering of communications services, and allow the service provider to hold annual marketing events at the community. In return for assisting with the marketing of the service provider's marketed services, service providers have typically paid AVB a "revenue share," which is a small percentage of the revenue the service provider generates from the apartment community.

15. The amount of compensation AVB has received routinely falls on the lower end of the revenue share scale offered by the service provider because multiple service providers typically serve these AVB communities, and each service provider typically has received non-exclusive marketing rights. Eighty-six percent of AVB's communities have non-exclusive marketing contracts in place. Fourteen percent have an exclusive marketing agreement. Of the 14% of communities with exclusive marketing contracts over 92% have at least two service provider options for residents, and the remaining 8% are served by only one service provider.

Types of Agreements in AVB's Portfolio.

16. The following table describes the types of marketing agreements and wiring usage rights currently in place at AVB communities.

Table 1: Types of Agreements in All Apartment Communities Owned or Managed by AVB

	Number of Communities	Percentage of Portfolio	Number of Communities	Percentage of Portfolio
Communities with one broadband provider	16	6%		
Exclusive wiring rights			15	5%
Use of owner wiring			15	5%

Use of provider wiring			0	0%
Exclusive marketing rights			3	1%
Communities with two broadband providers	244	85%		
Exclusive wiring rights			196	68%
Use of owner wiring			145	50%
Use of provider wiring			144	50%
Exclusive marketing rights			33	11%
Communities with more than two broadband providers	28	9%		
Exclusive wiring rights			10	3%
Use of owner wiring			11	4%
Use of provider wiring			9	3%
Exclusive marketing rights			3	1%
TOTAL Number of Communities	288	100%		

17. Our most important goal in negotiating agreements with broadband providers is to provide residents with reliable access to high-quality, high-speed service. We have found that being able to negotiate exclusive wiring agreements is very important because providers will often agree to higher customer service standards than might be available in the surrounding community. By acting as the intermediary between the provider and our residents we can also help to ensure those standards are met. Additionally, language in our agreements protects residents by requiring the provider to offer services that are at least consistent with retail services offered by that provider to multi-dwelling residential customers in the same geographic vicinity where the community is located and preventing the provider from charging residents rates that exceed rates charged to other similar customers within the same geographic vicinity.

18. Another benefit of being able to negotiate exclusive wiring and exclusive marketing agreements is that providers will sometimes agree to provide higher broadband speeds than those otherwise available in the vicinity of a property. The following table shows the maximum speeds available by the number and percentage of apartment units in our portfolio:

Speed	No. of Units	% of Portfolio
Up to 10/1Mbps	0	0
Up to 25/3 Mbps	0	0
Up to 50/5 Mbps	347	0.4
Up to 100/10 Mbps	0	0
Up to 250/25 Mbps	0	0
Up to 500/25 Mbps	148	0.2
Up to 1 Gbps/35 Mbps	42,859	50.0
More than 1 Gbps	42,395	49.0
TOTAL	85,749	100.0

This declaration was executed on October 14, 2021, in Arlington, Virginia.

Alaine L. Walsh

Alaine Walsh
Senior Vice President, Operations & Investment Services
AvalonBay Communities, Inc.

EXHIBIT D

Declaration of Jeffrey Kok

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Competitive Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF JEFFREY KOK IN SUPPORT OF FURTHER COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Jeffrey Kok, declare as follows:

1. I submit this declaration in support of the Further Comments of the Real Estate Associations in response to the Commission's Public Notice dated September 7, 2021, in the above-captioned matter.

2. I currently serve as Chief Innovation Officer and Chief Information Officer for Mill Creek Residential Trust ("Mill Creek"), the third largest apartment developer and fifth largest apartment builder in the United States, according to the National Multifamily Housing Council's most recent survey data. *See* "NMCH 25 Largest Builders (Rankings)" reported on NMHC's website at: https://www.nmhc.org/research-insight/the-nmhc-50/top-50-lists/2021-top-developers-list/

3. I have served as Chief Information Officer since 2015 and Chief Innovation Officer since 2019. I previously served in a variety of positions at Celanese International Corporation from 2005 to 2015, including as Head of Information Security (Chief Information Security Officer). As Chief Innovation Officer and Chief Information Officer for Mill Creek, I

am responsible for overseeing innovation, building technology, information technology, cybersecurity, and ESG (environmental, social, and governance).

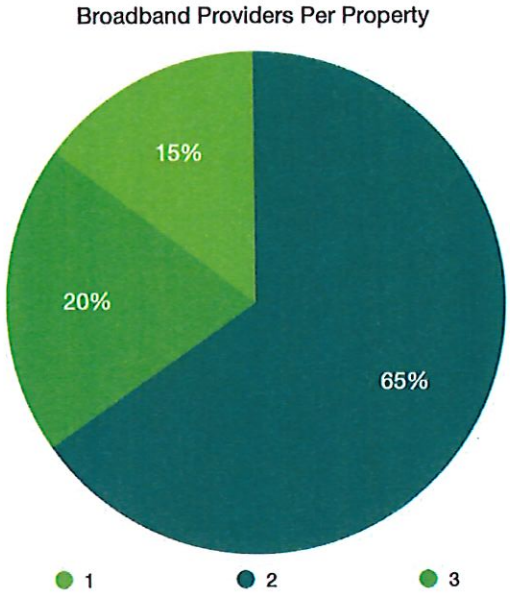
4. At present, Mill Creek owns a total of 56 apartment communities, comprising 14,267 units (located in 12 states and the District of Columbia), manages a total of 75 apartment communities, comprising 20,447 units (located in 14 states and the District of Columbia), and has a current development pipeline of approximately 80 apartment communities, comprising 23,876 units (located in 14 states and the District of Columbia).

Mill Creek's Goals for Resident Technology.

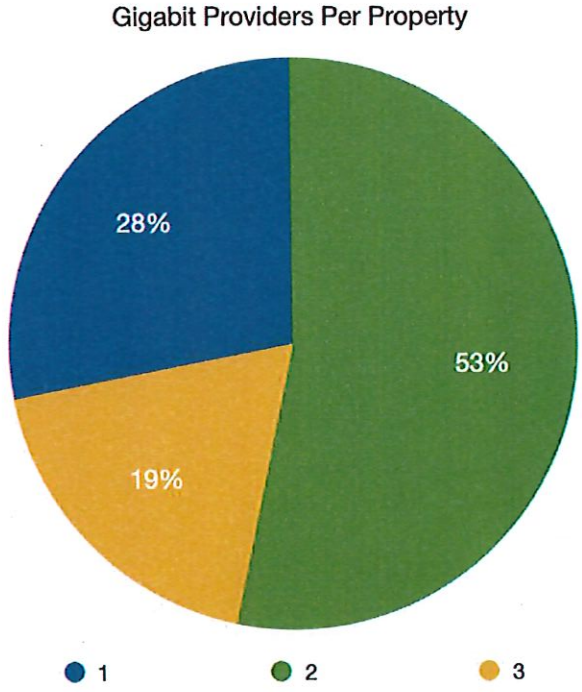
5. Mill Creek strives to attract and retain residents by offering best-in-class technology, including fast and reliable Internet access services. We aim to offer residents high quality broadband service options from multiple communications providers whenever possible. Mill Creek routinely brings in two or three communications providers, as well as a Wi-Fi provider for complimentary wireless broadband services in common areas, as a property amenity. Additionally, Mill Creek sometimes installs distributed antenna systems and Wi-Fi calling systems, enabling cellular carriers to also offer their broadband Internet services, affording Mill Creek residents even more options.

Service Provider Options.

6. Of the multifamily communities Mill Creek owns or manages, 20% have three or more broadband providers available to residents, 65% have two broadband providers available, and 15% have one broadband provider available. These do not include the growing range of fixed and mobile broadband services that offer residents even more alternatives.



7. Each of the multifamily communities that Mill Creek owns or manages has at least one provider offering a 1 Gbps tier of service or better, while 53% offer a choice of two gigabit broadband providers, and 19% have three gigabit broadband providers.



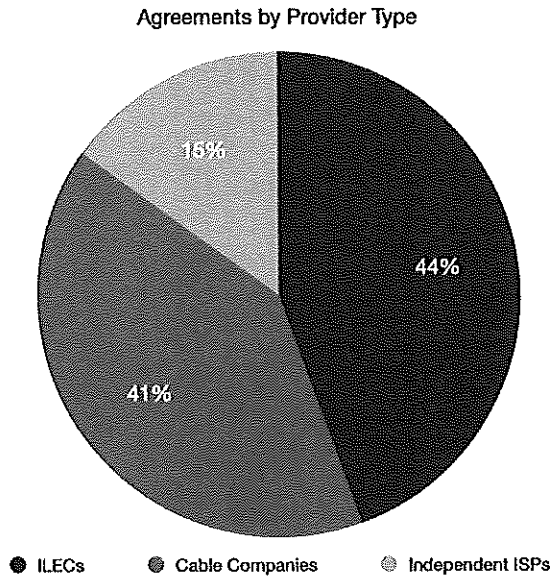
8. While 15% of the multifamily properties owned or managed by Mill Creek are currently served by only one wireline broadband provider (in each case offering a gigabit broadband tier), this has never been out of a desire to marginally increase ancillary income from a provider. We have encountered situations where the dominant cable company or telco in a market declined to serve (sometimes on a market-wide basis and over a period of years), where they failed to deliver a requested proposal, or where their system requirements posed insurmountable operational challenges. While Mill Creek generally solicits proposals from independent Internet service providers, that is no panacea. Independent providers are not available in every market and, even when they are, may be unable to offer a proposal. Mill Creek continues to work with incumbent and independent Internet service providers to offer residents an additional option at these properties.

Marketing Arrangements Do Not Preclude Competition.

9. Mill Creek has often chosen to enter into nonexclusive marketing agreements with broadband service providers, both to simplify management responsibilities and to ensure that residents are well-informed about the range of service options available to them. At present, 7% of multifamily properties that Mill Creek owns or manages have exclusive marketing agreements with a service provider. The remaining 93% have nonexclusive marketing agreements and/or access-only agreements with providers. (In an access-only agreement, a provider has the right to install and operate facilities to serve all residents, but not to conduct—or require that the property owner and management conduct—on-premises marketing activities. Such providers are listed, along with their ordering contacts, in a directory of available utilities that management makes available to all residents.)

10. We have not found that exclusive marketing arrangements inhibit facilities-based competition in multifamily communities. Of the 7% of properties Mill Creek owns or manages that have exclusive marketing agreements in place with a provider, 30% also have one or more additional providers serving pursuant to access-only agreements. (When only one provider is willing to serve a community, Mill Creek has seen no reason not to enter into an exclusive marketing agreement.)

11. The range of providers with whom Mill Creek has entered into marketing and access agreements shows the vitality of the current market. Of the multifamily communities Mill Creek owns or manages with marketing and access agreements, 44% of such agreements are with ILECs (e.g., AT&T, CenturyLink, Frontier, Verizon), 41% are with franchised cable operators (e.g., Charter, Comcast, Cox), and 15% of the marketing and access agreements are with independent Internet service providers (e.g., WaveG, GigaMonster, Starry).



12. At present, 29% of the multifamily communities Mill Creek owns or manages receive service from one or more independent Internet service providers. Mill Creek has entered

into marketing and access agreements with a number of these providers, including WaveG, GigaMonster, Fibersphere, Grande Communications, GiGstreem, Google Fiber, Hotwire Communications, RCN, Webpass, Starry, National WiFi, and WhiteSky. Most of these providers serve the multifamily market primarily or even exclusively.

Telecom Infrastructure Costs Compared with Telecom Revenue.

13. Mill Creek incurs many costs in building telecom infrastructure that will be used by services providers at a property. These costs include earthwork and trenching, underground conduit, pull boxes, riser conduit, main distribution frame rooms and telecom closets (that require the sacrifice of rentable square footage), riser wiring, home run wiring (and, in the case of concrete structures, multiple conduits to every unit), apartment distribution panels, in-unit wiring, and electric facilities (to the distribution panels, within telecom closets, and at the main distribution frame room). Most providers are willing to provide and install the riser wiring for their systems. Some will provide home run wiring for Mill Creek to install. Beyond that, the providers only provide the inbound circuit and network equipment for their services.

14. To take a recent and not atypical example, here are *partial* costs incurred on a 334-unit multifamily community in New York ("New York Community"):

- $10,000 for interior and exterior conduit;
- $56,000 for installation of home-run wiring from intermediate communication rooms to each apartment unit;
- $193,600 for in-unit cabling installation, termination, and faceplates;
- $24,000 for low-voltage design work;
- $5,150 for overhead design and implementation services;

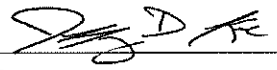
- $52,000 to provide and install apartment distribution panels in each unit to allow multiple providers to access in-unit wiring.

15. The partial costs for the New York Community do not include earthwork and dedicated electrical work and climate control for incoming broadband providers' systems, yet come to a total of $340,750. Agreements with the providers serving the property yielded a one-time payment of $33,400 (i.e., $100 per living unit) and a commitment for a future one-time payment of $12,525. Assuming both of these payments are made, Mill Creek will have received $45,925 to offset over $340,750 in expenditures for system components connecting these providers to their customers. Projected revenue sharing under the agreements is expected to yield approximately $6,252 per year. At that rate, it would take over 47 years before Mill Creek could break even on its initial outlay.

16. Upfront payments (aka "door fees") and revenue share arrangements in telecommunications agreements are not money-makers for Mill Creek. They merely serve to place some of the cost burden of telecom infrastructure on the providers who will use and profit from it.

17. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 18th day of October, 2021, at Dallas, Texas.



Jeffrey Kok

EXHIBIT E

Declaration of Andrew Smith

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF ANDREW SMITH IN SUPPORT OF COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Andrew Smith, declare as follows:

1. I submit this declaration in support of the Comments of the Real Estate Associations in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as President for Ancillary Services Management, LLC ("ASM"), an owner-centric consulting firm dedicated to managing and negotiating ancillary service agreements (including, but not limited to, voice, video and data agreements) for apartment owners, developers and managers who are our clients.

3. I have served as President of ASM since 2002. I have previously served in comparable positions since 1998, and I have over 23 years of experience in the delivery of video, broadband, and other communications services in multitenant environments. In this position, I am responsible for locating new services and service providers, negotiating agreements with the service providers, and managing new and existing telecom agreements for residential properties owned or managed by our real estate clients.

4. ASM currently oversees a total of 723 apartment communities, comprising 124,003 units, located in 24 states plus the District of Columbia.

5. In 2019, I submitted a Declaration in this proceeding describing in detail the types of broadband providers and agreements that ASM negotiates and oversees for our client's communities. The information data provided below is an update to the information and data provided in our 2019 Declaration.

6. As a representative and negotiating agent for numerous owners, developers and managers of apartment properties, ASM continues to emphasizes the importance of ensuring that residents of our clients' properties have access both to broadband internet access service and to a competitive choice of providers. As we stated in the 2019 Declaration, that is why ASM aggressively promotes having at least two broadband vendors on each community available to residents in markets where such competition exists. These vendors typically include the local franchised cable operator, the local telephone company's broadband product, and occasionally one or more independent internet service providers (ISPs"). While we are largely successful in being able to bring choice to residents or our client's communities, we continue to experience the same roadblocks we noted in our 2019 Declaration where providers are simply not interested in serving certain communities. The predominant reasons providers tell ASM they are not interested in some communities are related to costs or concerns about the provider's return on investment.

7. The table on the following page updates the information provided in our 2019 declaration and summarizes the properties for which ASM has negotiated one or more broadband agreements between January 1, 2017 and September 30, 2021 and sets forth the number of service providers at these properties.

TOTAL PROPERTIES WORKED BY ASM FROM JANUARY 1, 2017 TO SEPTEMBER 30, 2021		
	Number of Total Properties	Percentage of Total Properties
Properties with one broadband provider	4	1.73%
Properties with two broadband providers	201** including 30 properties that receive DSL service	87.01%
Properties with more than two broadband providers	26	11.26%
TOTAL	231 total properties	100%

** In this category, I have included 30 properties where one of the service providers delivers only Digital Subscriber Line (DSL) service. These are all properties where the telephone company has not retired its copper facilities and upgraded to fiber. While DSL may still be considered a "broadband" service, ASM is not sure if the speeds provided at some of these thirty DSL properties truly meet the parameters of a "broadband" service.

8. In addition, before the end of 2021, with the assistance of ASM, I anticipate that our clients will enter contracts for at least 21 additional communities to bring in a second broadband provider and for approximately 4 additional communities where a third broadband provider will be added. In 2022, I am working on approximately 13 communities that will be entering contacts adding a second broadband provider, 9 communities that will be adding both a second and a third broadband provider, and 24 communities that will be adding a third broadband provider.

9. ASM's clients realize that a property cannot survive in today's market without a choice of broadband services for residents. This is particularly true in new build situations. The table on the following page updates the information provided in our 2019 declaration and

summarizes the new build projects for which ASM has negotiated one or more broadband agreements between January 1, 2017 and September 30, 2021, and sets forth the number of service providers at these new build projects.

TOTAL NEW BUILD PROJECTS WORKED BY ASM FROM JANUARY 1, 2017 TO SEPTEMBER 30, 2021		
	Number of New Builds	Percentage of Total New Builds
Properties with one broadband provider	2	9.1%
Properties with two broadband providers	12	54.5%
Properties with more than two broadband providers	8	36.4%
TOTAL	22 New Build Projects	100%

8. Generally speaking, in most situations we continue to make arrangements for service at our clients' properties from the franchised cable multiple system operator ("MSO"). Those companies have such a large and heavily advertised presence in the market and have such ubiquitous networks that they are generally prepared to serve all of our clients' properties, and residents expect to have their service as an option.

9. Residents also typically are very much aware of the existence of broadband service from the local exchange carrier, and where such service is available, we need to offer that option to meet resident demand as well. In most cases we are able to accommodate that demand, but it is not unusual for Verizon and AT&T to refuse to upgrade their existing copper facilities to fiber which would enable residents to receive higher speed broadband service from those providers. This trend of providers selectively upgrading only certain properties has continued

since we noted it in the 2019 Declaration and it continues to be exasperating because it keeps certain properties stuck with lower speed Internet service.

10. As we noted in the 2019 Declaration, other properties get hindered with lower broadband speeds because providers are simply unwilling to make an investment to "build out" facilities or extend their networks to certain multi-family communities that really need better broadband service. This trend has continued. A recent example: I contacted Comcast about potentially deploying broadband service to an 80-unit Manufactured Housing Community located in Maryland where residents are not satisfied with the speeds currently provided by a small, private operator. Comcast refused the request, stating with specificity that the cost to deploy service to the community was just too high and that Comcast "would never make payback." Due to Comcast's approach, there is little I can do to assist the property in bringing in a competitive choice for residents.

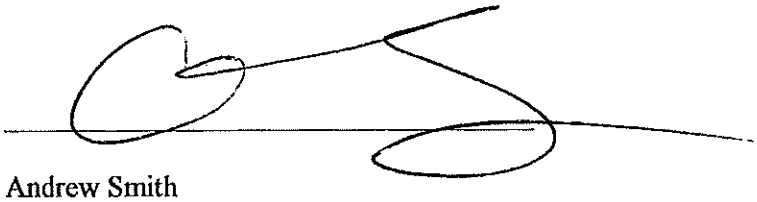
11. The newer competitive ISPs are a good alternative as we stated in our 2019 Declaration. ASM has continued to work with many of them, even though many of these ISPs have limited service areas. Thus, for some of our properties, there are no competitive ISPs available to provide broadband service. Furthermore, even within their service areas, ISPs often will only serve selected properties that they determine can meet their internal rate-of-return requirements. All ASM clients are open to service from such providers, both fixed wireless and fiber-optic-based, and we are currently evaluating, and in discussions with, GigaMonster, Blue Sky Satellite, Tengo, Dish Fiber and Starry to name a few companies to serve some of our clients' communities. However, some of the trends we noted in our 2019 Declaration have continued. There have been recent instances when we have had discussions with an ISP about serving a particular property, but we ultimately did not move forward because the ISP required a

bulk service agreement as a requirement for the ISP to deploy its services. In most situations, our client's goal is to increase the number of broadband choices available to residents – not to lock the property into a long-term bulk contract.

12. ASM continues to recommend to its clients that they seek to enter non-exclusive marketing arrangements with multiple providers at a single property whenever possible. However, several of ASM's clients own or manage some apartment properties in which one provider has exclusive marketing rights. But as we noted in our 2019 Declaration, the existence of exclusive marketing contracts at our client's properties continues to NOT be a detriment to other providers performing installations and upgrades to deliver competitive services. For example, in just the past nine months ASM was able to arrange for Verizon to install its fiber facilities for broadband deployment at three different properties where Verizon will have no marketing rights because another provider has exclusive marketing rights. The result is that 892 residential units will have a choice of at least two broadband providers and the exclusive marketing arrangements at these properties were not an obstacle to bringing a competitive choice for residents. The more common reasons we receive from a provider for not deploying fiber to a particular property are: the location of the property; the costs of the fiber deployment or upgrade at the property; the type of property it is (such as a mobile home community); or a willingness by the provider to serve a property only under a bulk billing arrangement.

13. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 14th day of October, 2021, at Fairfax Station, Virginia



Andrew Smith

EXHIBIT F

Declaration of Kimberly Smith

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF KIMBERLY SMITH IN SUPPORT OF FURTHER COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Kimberly Smith, declare as follows:

1. I submit this declaration in support of the Further Comments of the Real Estate Associations in response to the Commission's Public Notice dated September 7, 2021, in the above-captioned matter.

2. I currently serve as the Vice President of Ancillary Services for Windsor Property Management Company ("Windsor"), the vertically-integrated property management company of GID, the 26th largest apartment owner in the United States, according to the National Multifamily Housing Council's most recent survey data. *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at: https://www.nmhc.org/research-insight/the-nmhc-50/. Windsor and GID, are herein collectively referred to as "GID/Windsor."

3. Since 2002, I have overseen ancillary services for GID/Windsor in my current role and in my former position of National Director of Ancillary Services. I have previously served in comparable positions, and I have over 25 years of experience in the delivery of video, broadband, and other communications services in multitenant environments. In this position, I

am responsible for the research, development and implementation of programs, products and services that enhance the experience of our residents. I negotiate all potential multifamily ancillary contracts, including, but not limited to, contracts for cable, local telephone, long distance telephone and high-speed internet services, and I review all ancillary contracts during the due diligence process for acquisitions of new assets.

4. GID/Windsor currently operates/manages a total of 126 apartment communities, comprising 37,145 residential units, located in 14 states.

5. In 2019, GID/Windsor submitted a Declaration describing the broadband agreements that it had in place at our communities. The information and data provided herein is an update to the information and data provided in our 2019 Declaration.

6. In general, the trends we noted in our 2019 Declaration have continued. Since we submitted the 2019 Declaration, GID/Windsor has worked to increase the broadband service choices for our residents. We have done this primarily by working with independent Internet service providers ("ISPs") to offer an alternative choice to our residents for broadband service beyond the franchised cable service providers ("MSO) and incumbent local exchange carriers ("ILEC") who also provide broadband service to most of our communities.

7. GID/Windsor has developed three new build projects since we submitted the 2019 Declaration. Residents at all three projects will have a choice of three broadband service providers: (i) the MSO in the service area, (ii) the ILEC (fiber service), and (ii) an ISP. This trend will continue as GID/Windsor has implemented a directive to bring in at least three broadband service provider choices at all of our new build projects whenever possible so that our residents have a broad array of choices.

8. GID/Windsor is also working with ISPs to add new broadband choices for residents of our existing assets. These ISPs typically become the second or third choice of broadband services for residents of those properties. The ISPs we have worked with to increase broadband choices for residents include WaveG, Google Fiber, GigaMonster, Gigstreem, and National WiFi. It is our ultimate goal to provide multiple choices of broadband service providers to all of our communities.

9. The table below is a current list of all residential properties in the GID/Windsor portfolio based on the number of providers. The updated data below shows trends that are consistent with the data in our 2019 Declaration. We have increased the number of properties in our portfolio that have three or more service provider choices for our residents.

	Number of Total Properties	Percentage of Total Properties
Properties under a bulk contract*	2	1.6%
Properties with only one provider (excluding the bulk properties)	1	0.8%
Properties with two providers**	103	81.7%
Properties with three or more providers**	20	15.9%
TOTAL	126	100%

*It should be noted that GID/Windsor does not enter bulk contracts as a general business practice. The two properties in our portfolio that are subject to bulk contracts were properties we acquired that were already under a bulk contract at the time of the acquisition.

** In these categories, we have included any service provider who serves a property even if the provider is capable of only delivering Digital Subscriber Line (DSL) service. This includes properties where the telephone company has not retired its copper facilities and upgraded to fiber. While DSL may still be considered a broadband service, GID/Windsor is not sure if the speeds provided at some of our existing "copper" properties truly meet the parameters of a "broadband" service.

10. GID/Windsor has encountered no obstacles in our broadband expansion plans due to pre-existing exclusive marketing or exclusive wiring arrangements. All of the twenty properties in our portfolio that have three or more providers are subject to an exclusive wiring contract with either (A) an MSO such as Comcast or Charter where the provider has an exclusive right to use a portion of the internal wiring owned by GID/Windsor, or (B) an ILEC such as AT&T or Verizon where the provider retains ownership and exclusive dominion over internal lines that extend to the residential units. The ISPs we work with have not been deterred by any exclusive wiring arrangement from deploying their broadband services at any of those properties. Similarly, two of the twenty properties where three providers are available are subject to exclusive marketing agreements that GID/Windsor assumed from a prior owner. However, those exclusive marketing agreements have also not prevented broadband deployment by an ISP at those two properties. GID/Windsor entered "access only" contracts with ISPs at those two properties pursuant to which the ISP was granted no marketing rights.

11. In our experience, exclusive wiring contracts and exclusive marketing contracts have NOT been obstacles to increasing broadband choices for our residents. The ISPs who serve our properties have installed their own wiring when necessary and they have found their own creative marketing solutions that do not conflict with the exclusive marketing rights of another provider at two of our properties.

12. As was the case in our 2019 Declaration, GID/Windsor continues to be actively engaged in efforts to have the applicable ILEC upgrade our copper properties to fiber so that our residents have a better option for high-speed broadband service that is an improvement over DSL. Once again, our efforts have been only partially successful. Over the past two years, we have reached agreement with Verizon to upgrade six of our existing residential communities to

fiber. Four of those upgrades have been completed and the other two are in progress. As we noted in our 2019 Declaration, AT&T completed fiber upgrades at 8 of our existing properties before cutting back their fiber overbuild program. Since 2019, AT&T has surveyed twelve of our other properties for fiber upgrades but those upgrades have not started as we remain subject to the whims of the service provider when it comes to which of our existing properties get upgraded and which of them remain stuck with outdated copper technology.

13. Windsor/GID continue to look for opportunities with MSOs, ILECs, and smaller, independent providers to bring additional choices of broadband services to residents of our communities.

14. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 20th day of October, 2021, in Dallas, Texas.

Kimberly Smith

Kimberly Smith

EXHIBIT G

Declaration of Linda Wu

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF LINDA WU IN SUPPORT OF THE FURTHER COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Linda Wu, declare as follows:

1. I submit this declaration in support of the Further Comments of the Real Estate Associations in response to the Commission's Public Notice dated September 7, 2021, in the above-captioned matter.

2. I currently serve as Vice President of Asset Management for Essex Property Trust, Inc. ("Essex"), the 12th largest apartment owner in the United States and the 24th largest apartment manager in the United States, according to the National Multifamily Housing Council's most recent survey data. *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at: https://www.nmhc.org/research-insight/the-nmhc-50/.

3. I have served as Vice President of Asset Management since 2019. In this position, I am responsible for oversight and management of broadband, asset management, redevelopment, development, marketing, strategies, innovation, design, and acquisition including multi-family, single family, and commercial assets.

4. Essex currently owns a total of 243 apartment communities, comprising 61,138 units, located in 2 states.

5. In 2019, we submitted a Declaration describing the broadband agreements that Essex had in place at our communities. The information and data provided below is an update to the information and data provided in our 2019 Declaration.

6. In general, the trends we noted in our 2019 Declaration have continued. We have continued to expand choices of broadband service for our residents. As the updated data in the table below reflects, more than three quarters of the residential units in the entire Essex portfolio now have access to at least two broadband service providers.

	Number of Total Properties	Percentage of Total Properties	Percentage of Total Residential units
Properties under a bulk contract	3*	1%	2%
Properties with only one broadband provider (excluding the bulk property)	60	25%	22%
Properties with two broadband providers	93	38%	36%
Properties with three or more broadband providers	87	36%	40%
TOTAL	243	100%	100%

*It should be noted that Essex does not enter bulk contracts as a general business practice. The three properties in our portfolio that are subject to bulk contracts were properties we acquired that were already under bulk contracts at the time of the acquisitions.

7. Since Essex submitted the 2019 Declaration, we have worked hard to increase the broadband service choices for our residents. As a result, we have increased the number of our properties where three or more providers are now available to residents from 7% of our total portfolio in 2019 to 36% of our total portfolio in a little more than 2 years. We have done this primarily by working with independent Internet service providers ("ISPs") to offer an alternative choice to our residents for broadband service beyond the franchised cable service providers ("MSO) and incumbent local exchange carriers ("ILEC") who also provide broadband service to most of our communities.

8. Essex has entered contracts with ISPs for 166 of our 243 communities - or 68% of our total portfolio. These ISPs are either the second or third provider of broadband services for residents of those properties. The ISPs we have worked with to increase broadband choices for residents include WaveG, Consolidated Smart Systems, Starry, Gigstreem, BAI Connect, and Willoweb. As of the date of this Declaration, we are continuing to work with ISPs to provide a choice of broadband service to residents of our other properties. It is our ultimate goal to provide multiple choices of broadband service providers to all of our communities. So far, we have discovered that the current marketplace is largely working well to achieve that goal.

9. Essex has encountered no obstacles in our broadband expansion plans due to exclusive marketing or exclusive wiring arrangements. As we stated in our 2019 Declaration, nearly all of our communities are subject to some type of exclusive wiring contract: either (A) a service contract with an MSO such as Comcast or Cox where the provider has an exclusive right to use a portion of internal wiring owned by Essex that extends to the residential unit, or a (B) a service contract with an ILEC such as AT&T where the provider retains ownership and exclusive dominion over internal fiber lines that extend to the residential units. The ISPs we work with

have not been deterred by any exclusive wiring arrangement from deploying at 166 of our properties. Where necessary, the ISPs will simply install their own wiring in order to deliver service to residents.

10. As a business practice, Essex does not enter exclusive marketing agreements. However, some exclusive marketing contracts are still in effect at some of the communities we have acquired where we were assigned an exclusive marketing contract by the seller at closing. However, those exclusive marketing agreements have not been an impediment to the deployment of new broadband services. In fact, we have entered into "access only" contracts with ISPs at 10 existing properties in our portfolio that are still subject to exclusive marketing contracts with other providers. In an "access only" contract, the ISP has no marketing rights. In our experience, exclusive marketing contracts have NOT been any obstacle to increasing broadband choices for our residents as our ISPs have implemented marketing plans at these properties that do not require on-site activities and that do not involve our on-site leasing teams. We have consistently found that ISPs can find their own creative deployment and marketing solutions that do not infringe upon any exclusive wiring or exclusive marketing rights of any other providers.

11. As noted above, Essex has found that the current market for broadband service to MDUs is working well as a mechanism for adding more broadband choices for our residents. That said, there are certain properties where adding extra broadband choices for our residents remains a challenge. However, we certainly do not think that regulation of marketing, wiring or revenue share arrangements will help solve these challenges or will benefit our residents at all. Where we continue to struggle to find competitive choices for residents are at properties where providers simply cannot, or will not, make the investment necessary to deploy services. As we mentioned in our 2019 Declaration, service from many ISPs is only available within the

footprints where they have deployed fiber. Thus, for some of our properties, there are no competitive ISPs available to provide broadband service. Furthermore, even within their footprints, ISPs often will only serve selected properties that they determine can meet their internal rate-of-return requirements.

12. Likewise, Essex has been working with AT&T on potential upgrades to bring fiber facilities to some of our existing communities that are currently served by AT&T's outdated copper technology that delivers slow Internet access speeds. Unfortunately, these discussions have been ongoing for a number of years and have not come to fruition. To date, AT&T has not yet completed a fiber upgrade at any of our existing copper properties despite having completed site assessments at 68 communities comprised of 17,061 units. Essex has been given a variety of reasons for why this has happened but the most obvious reason is that AT&T simply hit the brakes on its fiber overbuild program a few years ago, apparently for financial reasons. As a result, residents in our copper-served communities have not benefited from AT&T's fiber broadband service. This is certainly not because AT&T was deterred by any existing marketing or exclusive wiring arrangement at any of our properties. It is simply because AT&T gets to pick and choose which properties it will upgrade to fiber and which properties get left behind with slow, outdated services. So far, our properties have been left behind. We hope that will change in the near future. We will continue to work with AT&T in an effort to bring updated fiber-based broadband service to our residents.

This declaration was executed on the 20th day of October, 2021, in Woodland Hills, California.

DocuSigned by:
Linda Wu 10/20/2021
855618C3A15E4B0...

Linda Wu

EXHIBIT H

Declaration of Kimberly Grimm

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF KIMBERLY GRIMM IN SUPPORT OF FURTHER COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Kimberly Grimm, declare as follows:

1. I submit this declaration in support of the Further Comments of the Real Estate Associations in response to the Commission's Public Notice dated September 7, 2021, in the above-captioned matter.

2. I currently serve as Executive Vice President of Development for Continental Properties Company, Inc. ("Continental"). Continental is a national developer, owner and operator of high-quality apartment homes across the United States. In 2018, we were listed as the eighth largest developer of apartment homes by the National Multifamily Housing Council ("NMHC") and based on reported information, we are the largest garden style, suburban apartment developer in the United States. We typically commence construction on approximately 3,000 new apartment homes per year. We have developed over 28,000 apartment homes and are currently managing approximately 16,800 apartment homes with 3,600 apartment homes under construction.

3. I have served as Executive Vice President of Development since 2017. I have previously served in comparable positions since 2006 at Continental, and I have over 25 years of experience in real estate with over 10 years of experience specifically in the multifamily industry. In my position at Continental, I am responsible for development of new multifamily communities which includes leadership of market strategy, project sourcing and entitlement/permitting of projects. I am an Officer of the company where I assist with strategic planning for the company and I am a member of Continental's Investment Committee which determines where Continental will place its capital and resources along with the approval of projects for development. I also participate in NMHC's Workforce Housing Committee.

4. Continental currently owns a total of 63 communities, comprising 16,800 apartment homes located in 13 states. Of the apartment homes we manage, 44% of those homes qualify at 80% of HUD's AMI. For example, in Austin, we developed three communities totaling 844 apartment homes; all of these homes qualified at 80% of AMI.

5. Continental develops property in several markets across the United States such as Memphis, Grand Rapids, Michigan, many markets in Florida, Atlanta metro, Phoenix metro, Minneapolis metro, Dallas metro, Denver metro along with Chicago metro to name a few of the markets in which we develop.

6. Continental develops two types of garden style communities known as either the Springs or Authentix. The Springs communities consist of two-story residential buildings with all apartment homes having direct access into each home. Each residential building has anywhere from 20 to 28 homes with some buildings having attached garages. Each community ranges in size from 200 to 340 homes and features a community center, resort style pool area, a fitness room and pet playground. The size of the community depends on market conditions and land configuration.

Our Authenix brand is a two-story residential building as well but is developed at a lower cost structure so that the resident's rent can be lowered as well. The community size is 240 to 288 homes and the customer targeted for this product has an income level which qualifies at HUD's 80% AMI (Area Median Income). This community still features a clubhouse, pool, fitness center and pet playground.

7. In 2019, I stated that Continental project costs range between $35,000,000 to $55,000,000 per project for our Springs communities, which does not include our labor or other overhead costs. I also provided a step-by-step description of the development process and the many hurdles developers face between identifying the need for more housing in a particular market and beginning the leasing process at a completed community. Since 2019, costs to developed rental housing communities have continued to increase due to municipal requirements which includes requiring additional scope items on the project, construction of public infrastructure, plan review fees, impact fees and real estate taxes; material cost volatility; supply chain challenges; construction labor shortages; and increased land prices to note a few items where costs have increased. Our 2021 project costs now range between $49,750,000 and $70,000,000 per project for our Springs communities versus the 2019 project costs. This is approximately $180,000 to $200,000 per home and again, these project costs do not include our labor or other overhead costs, versus $150,000 to $199,000 per home in 2019.

8. Wiring installation at our projects is typically performed by subcontractors in conjunction with the ISP (Internet Service Provider). The following costs are based on a 300-home community.

- Site infrastructure, including conduit and fiber, is a shared cost between ISP and owner depending on requirements ($50,000 to $150,000).
- Building infrastructure, including pedestal boxes, interior cabling, unit wiring: This

cost is borne by the owner ($50,000 to $75,000).

- Clubhouse MDF (Main Distribution Frame) is the central location for all networking equipment and fiber and tv distribution. This is provided by the owner ($5,000).
- Wireless infrastructure throughout site. This is provided and actively managed by the ISP throughout the life of the contract. ($60,000 for equipment, paid by Continental; this does not include the management fee we pay to the ISP.)

9. Continental also assumes responsibility for the costs below.

    a. Electrical connections in main communications room: Approximately 12 extra outlets are provided in MDF; cost is around $1500 to $2000.
    b. Electrical connection in intermediate communications rooms: Approximately $10,000.
    c. Installation of home-run wiring from intermediate communications rooms to each apartment unit: Approximately $30,000 to $50,000 per site.
    d. Adding broadband drop/faceplate in each apartment unit: This is covered separately in our contract with our general contractor and electrical contract – it is difficult to breakout.
    e. Adding power outlet in each apartment unit: Approximately $100 to $200 in each unit.
    f. Engineering and system design review: This is typically handled by the ISP, architect, electrical provider and Owner; this is difficult to put a number on, but is several thousand dollars as each site is unique.

10. Electrical utility costs related to equipment in our clubhouse and each building are in the thousands of dollars per year, but an exact estimate would be difficult. There is typically a full network rack at the MDF and equipment throughout the site.

11. Residents of a typical Continental property have access to broadband Internet service from providers such as ATT, Comcast, Cox Communications, Spectrum, Nexgen, Grande Communications, Dish, Mereo Networks and Suddenlink. Continental works with the local communications companies to provide excellent internet service to all of its residents.

12. Most providers are limited to geographic areas and often will require buildout to our projects, if they are willing to extend that far, as we typically build in suburban areas. These

buildouts are costly and require a large time commitment that often far exceeds our typical schedule, requiring us to work with non-traditional providers that have access to many different internet providers. In order to provide proper service, most ISPs require exclusive use contracts so that they have control over all distribution points to ensure quality service. Exclusive contracts can limit the number of providers due to unwillingness to include proper infrastructure in their proposals. Many ISPs require contracts that are restrictive in length of years and potential buyout terms. At various times when we have contacted providers regarding serving a property, they have given the following reason for not doing so:

a. Lack of distribution infrastructure near the property;
b. Presence of incumbent on the property;
c. Project would not meet internal return on investment criteria;
d. Property too small; and
e. Existence of exclusive wiring agreement with incumbent.

13. Continental is primarily a developer and operator of new or fairly new properties. Our main hurdle in dealing with providers is lack of competition on a local level and the suburban locations that may require extensive infrastructure build out by the provider. These providers will often not enter into competitive agreements because they have no local competitor. For example, they will refuse to include CSLAs (Customer Service Level Agreements) that meet our high standards for our residents. In the past, we have often had no choice and were forced to meet the provider's requirements. This leads to little competition and subpar quality service. We have experienced these types of issues in both Johnstown, Colorado, and Lakeville, Minnesota, and would not have contracted with these parties if we had other options.

14. Our most important goal in negotiating agreements with broadband providers is to give residents access to high quality service. All of our new builds require fiber to the unit and excellent customer service. We typically provide the fastest speeds available. We have found that exclusive wiring agreements and national provider relationships with ISPs give us the ability to

negotiate better terms, which in turn guarantees a higher level of service to our residents.

15. Our current contracts are what we refer to as white glove service. Residents have access to service immediately upon move in, excellent customer service, and are provided standard services at a fraction of what the market rate allows.

16. We have entered into an agreement with Dish Fiber at our Springs at Foothills Farm location in Colorado Springs, Colorado. Our agreement has speed criteria and service quality guarantees that we pass onto our residents. Dish Fiber has met with several residents to resolve speed issues, quality issues and more often than not issues with resident owned equipment. Dish Fiber personnel are available via 800 number 24/7 and we have a local technical support representative that has worked onsite in resident homes to resolve these issues. While many ISPs advertise high customer service, we have found that having a national contract, with leverage and national account representatives ensures the highest level of service and quick problem resolution for our residents.

17. Our new communities offer up to 1GB (Gigabit) service as a standard to all of our residents not only in their homes, but throughout the community including the clubhouse, pool, pet playgrounds, etc. This is far and above the typical demands of our residents which we estimate to be around 30Mbps (Megabit) per household.

18. The following table shows the maximum speeds available in our portfolio.

Speed	No. of Properties	% of Portfolio
Up to 10/1Mbps	0	0
Up to 25/3 Mbps	0	0
Up to 50/5 Mbps	0	0
Up to 100/10 Mbps	0	0
Up to 250/25 Mbps	3	5
Up to 500/25 Mbps	0	0
Up to 1 Gbps/35 Mbps	0	0
More than 1 Gbps	60	95
TOTAL	63	100

We have approximately 63 properties in our current portfolio. We have three properties that we have identified that cannot provide 1GB service due to older infrastructure or limits by a sole provider, however the speeds at each of these properties is still far beyond the FCC definition of broadband speed which is 25 Mbps download and 3 Mbps upload.

19. I declare under penalty of perjury that the facts stated herein are true and correct tothe best of my knowledge and belief.

This declaration was executed on the 15th day of October, 2021, at Menomonee Falls, Wisconsin.

Kimberly Grimm
Executive Vice President of Development
Continental Properties Company, Inc.

EXHIBIT I

Declaration of Greg McDonald

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Competitive Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF GREG G. MCDONALD IN SUPPORT OF FURTHER COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Greg G. McDonald, declare as follows:

1. I submit this declaration in support of the Further Comments of the Real Estate Associations in response to the Commission's Public Notice dated September 7, 2021, in the above-captioned matter.

2. I currently serve as Executive Managing Director - CEO for McDonald Telecom Consulting, LLC ("McDonald Telecom"). McDonald Telecom negotiates telecom business deals for numerous apartment owners and apartment development companies, as well as apartment management companies.

3. I have served as Executive Managing Director - CEO since 2020. I have previously served in comparable positions since 1986, and I have over 35 years of experience in the delivery of video, broadband, and other communications services in multifamily environments. In this position, I am responsible for negotiating the terms and conditions of various telecom business deals on behalf of the Owner with one or more telecom vendors for numerous multifamily assets.

Benefits of Exclusive Wiring Agreements

4. Our most important goal in negotiating agreements with broadband providers is to give residents access to a variety of high quality broadband services at competitive market rates. We have found that being able to negotiate exclusive wiring agreements is very important because providers will often agree to upgrade outdated internal building wiring as well as the delivery systems that connect to the building wiring.

5. SLA standards in a broadband service agreement between the multifamily property owner and the broadband vendor are extremely important. It is the only mechanism owners have to hold a broadband provider accountable for providing quality service to residents. Multifamily communities without SLA standards in place have no recourse to compel the broadband provider to fix chronic service problems and/or make infrastructure investments to ensure the resident are receiving reliable and competitive broadband services.

6. McDonald Telecom has negotiated and implemented fiber upgrade agreements with AT&T Connected Communities. Prior to the fiber upgrade, residents had to rely on outdated twisted pair PIC cable to receive broadband services. xDSL bandwidth speeds of less than 30Mbps are very common in the old copper PIC cable serviced systems. AT&T would not have upgraded the internal unit wiring to fiber if AT&T could not retain the exclusive use of the AT&T-owned wiring.

Broadband Service Speeds

7. Another benefit of being able to negotiate exclusive wiring and exclusive marketing agreements is that providers will sometimes agree to provide higher broadband speeds than those otherwise available in the vicinity of a property. Two recent fiber upgrades at multifamily assets in Houston, Texas, enabled residents to subscribe to high-speed Internet packages with bandwidth speeds up to 1Gbps/1Gbps, while similar multifamily communities in the same area

continue to receive substandard broadband service over old PIC cabling from AT&T Connected Communities.

Exclusive Marketing Does Not Preclude Competition

8. McDonald Telecom represents multifamily owners and management companies with numerous apartment communities in which one provider has exclusive marketing rights. However, at many of our properties where one provider has exclusive marketing rights, there are often one or more providers that are still serving our residents either without a contract or in some cases with a contract that does not include marketing rights (an "access only" contract). This most often occurs at communities where the exclusively marketed vendor has upgraded their facilities and is providing competitive services to residents and the other provider that is operating with access rights only has outdated infrastructure and is unwilling to upgrade their facilities providing broadband service to and or within the multifamily community

9. The cost to providers (Cable MSOs, ILECs, competitive providers) to upgrade/replace RG-6 coaxial or CAT6 twisted pair home run cabling is between $200-$300/unit. The owner will typically pay the capital cost either directly or as a condition of a contract renewal.

10. There are numerous structured wiring configurations but the most common includes CAT-6 or single mode fiber and an RG-6 tri-shield or better cable and a non-metallic structured wiring panel w/ dedicated electric power service. The average cost to install this infrastructure in a new development multifamily project is in the $400-$500/unit range. These capital costs are typically paid solely by the owner/developer. On occasions when the wiring has become outdated and the contract term is up for renewal, broadband vendors will typically provide a one-

time cash contribution in the agreement for a portion of this infrastructure in return for exclusive use of wiring rights.

11. The costs stated in the previous paragraph have several components. Broadband vendors will typically require the owner/developer to install a 2" (up to 4") conduit distribution system from the property line to the primary demarc within the multifamily project and then extend the conduit pathway from the demarc to the individual IDF closets throughout the multifamily project. The $150-$200/unit capex expense (based upon a 250 unit project) for the conduit system is typically not reimbursed by the broadband vendor. The broadband vendor will require exclusive use of the conduit during the term of the agreement so a second conduit system is typically installed if a second broadband vendor will be onsite. Most owners will install an extra conduit pathway ("shadow conduit") for their sole use in the future. Each additional conduit pathway capex expense typically runs in the $40-$60/unit range. The Home Run and Home Wiring are typically installed by the owner and is not usually reimbursed by the broadband operator. The capex expense for the internal building wiring system can vary greatly but, as stated earlier, the average cost for a new development multifamily project is in the $400-$500/unit range. The non-metallic media panel in each unit is an additional $150/unit. So total costs at a 250 unit property can add up to $137,500 to $162,500 ($550-$650/unit). The provider, however, typically only pays the Owner a door fee of $150-$200 per unit.

Typical Multifamily New Development Capital Cost

a. Underground conduit pricing in a non-rock environment average is $12/linear foot of trench.
b. Microduct installation labor starts around $1/linear foot of Microduct. This does not include the cost of the material which is usually provided by the broadband vendor at no cost to owner/developer.
c. Non-metallic media panels (14" X 30") installed cost is approximately $150/unit.

d. Electrical outlets capex in the IDF and MDF closets is $50-$75/duplex outlet.
e. Installation of home-run wiring (in new development projects) from intermediate communications rooms (IDF closet) to each apartment unit is $100-$200/home-run.
f. Installation of the Home Wiring (in new development projects) from the media panel to each outlet in the apartment unit is $50-$75/outlet.
g. Labor cost to provide security when provider is working in occupied apartment unit starts at $5/unit for single entries for a period of 20 minutes or less.

Other Costs Incurred to Accommodate Access by a Provider

12. The broadband provider typically requires the owner to provide electrical power service and infrastructure to support the broadband operator's system. Electrical outlets are typically required in the MDF (main demarc), IDF closets and inside the media panel within each unit. The monthly recurring charge for electrical service is typically $75-100/month for the backbone system power, up to about $1,200 a year. The $60/unit capital costs for the electrical infrastructure are typically paid by the owner and not reimbursed by the broadband operator. If the broadband vendor determines that sometime during the term of the agreement a portion of the Home Wiring (and sometimes Home Run Wiring) needs to be replaced, the owner will often be responsible for covering the replacement cost. The average replacement cost of a Home Run Wiring is $150-$200/span and $75-$100/span for Home Wiring.

Sharing of Home Run Wiring Is Not Desirable.

13. One of the reasons we enter into exclusive wiring agreements is that we have found that when more than one provider is utilizing a common Home Run Wiring system, a logistical tug-of-war environment is created between the vendors to gain control of the Home Run Wiring. Only one vendor can utilize the wiring at a time, so as a result, residents are prevented from being able to receive broadband service from the second vendor. Shared Home Run Wiring

configurations simply do not work and are operationally problematic for all involved parties. Owners will typically grant non-exclusive use of the Home Wiring because there is usually adequate infrastructure within the unit to support multiple vendors.

Providers Retain Discretion Not To Serve.

14. Residents are very much aware that both the franchised cable operator and the local exchange carrier typically offer broadband service and we prefer in most cases to offer both options to meet resident demand. It is very rare for a property not to be served by the cable operator, and in most cases we are able to obtain at least POTS and DSL (sometimes VDSL) service from the telephone company. Unfortunately, some of the major telephone companies refuse to extend their fiber-based broadband service to a building or refuse to upgrade their existing copper facilities to fiber so that higher speed broadband service is available to the residents. The explanation that is typically given is the capital costs to upgrade are too high, so the upgrade is rejected and the residents are left with an outdated copper wire system.

Competitive ISP Vendors in the Marketplace

15. There is a growing number of competitive ISP vendors that offer a very competitive broadband service to the incumbent MSO and LEC vendors. Competition from these competitive ISP vendors has, at least in part, forced the incumbent MSO and LEC vendors to upgrade their networks and provide more bandwidth at the same or even lower rates. Unfortunately, only a small percentage of owner assets (represented by McDonald Telecom) are within the footprint of one or more of the competitive ISP vendors.

Competitive ISP Vendor Property Selection Criteria

16. The target communities for these ISP vendors are primarily high-rise and mid-rise building that are locate within a relatively small footprint. Properties that fall outside of the footprint or are not high-density buildings are typically bypassed for economic reasons. Being in the wrong geographic location is the primary cause for a property being rejected by a competitive ISP vendor. Other mitigating factors causing rejection include the absence of existing infrastructure (conduits & wiring), building demographics (vendors typically target A+ properties), and property size (under 150 units is generally not preferred). A competitor may also be discouraged if an incumbent has exclusive wiring or exclusive marketing rights, but in the end this is a business decision combined with other factors. For example, it is not exclusive use of wiring that is the problem – it is the cost of installing its own infrastructure that affects the competitor's calculation. I am aware of many properties where incumbents have such rights and competitors have agreed to serve. The aforementioned criteria for a property being rejected is not limited to the competitive ISP vendors.

Incumbent MSO & LEC Vendor Property Selection Criteria

17. There are many properties in the residential market in which the MSO and or LEC providers do not enter into reasonable exclusive wiring or marketing agreements. These communities tend to be smaller properties (less than 150 units), or locations with lower income demographics, or locations with one or more competitive vendors onsite, or a combination of one or more of the above. In instances of contract renewals, the MSO and LEC vendors will not typically agree to enhance the infrastructure which is required to provide competitive broadband service to residents or provide capital reimbursements to the owner for the same. The business

offers are typically presented as "take it or leave it". In these cases, owners are forced into signing bad agreements (for example access only agreements which do not provide funds for Owner to use for the maintenance and repair of the internal wiring at the property) so their residents will at least have access to some sort of broadband service. It is rare to find a second broadband provider willing to serve such a building.

I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 19th day of October 08, 2021, at Katy, Texas.

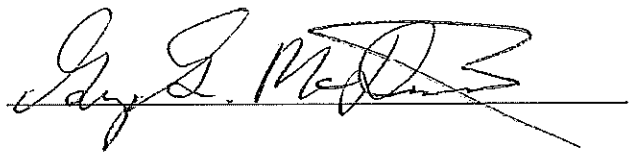


EXHIBIT J

Declaration of Kevin Hott

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142

DECLARATION OF KEVIN HOTT IN SUPPORT OF THE FURTHER JOINT COMMENTS OF THE REAL ESTATE ASSOCIATIONS

1. I, Kevin Hott, am the Vice President of Information Systems & Technology at E&S Ring Management Corp. ("E&S Ring") located in Los Angeles, California. E&S Ring owns and/or manages 21 apartment home communities (also referred to herein as multi-tenant environments or "MTEs") consisting of 6,667 residential units throughout California and Washington.

2. As Vice President of Information Systems & Technology at E&S Ring, one of my duties is to ensure that the residents of our MTEs receive high quality broadband services. In that capacity, I have participated in the negotiation of contracts with various service providers governing the provision of broadband services to our MTEs. I am also involved in the budgeting and implementation of investments we have made to wiring and other infrastructure at our MTEs to improve the quality of the broadband services available to our residents.

3. E&S Ring submitted a previous declaration in this proceeding (See Declaration of Kevin Hott in Support of the Reply Comments of Hubacher & Ames, PLLC, August 22, 2017, herein after the "2017 Declaration").

4. As stated in the 2017 Declaration, a large majority of our MTEs are served by more than one service provider. At these MTEs served by multiple providers, E&S Ring has found that our residents have a better experience if each provider has a specific "run" of wiring that is dedicated solely to that provider to deliver service to residential units. In some cases, a provider owns its own wiring or fiber lines that extends to a unit and in other cases the provider uses wiring owned by the owner of the MTE. Since we submitted the 2017 Declaration, we have gained further insights into shared wiring which have convinced us that our residents receive a

better level of customer service when providers do not attempt to share wiring. In general, our on-site staff members receive fewer complaints about poor service, unintentional service disconnections, and delayed service installations when a provider relies on either (a) wiring they own and have exclusive control of, or (b) on owner-owned wiring that has been designated for the provider's exclusive use in a service contract.

5. Specifically, in our 2017 Declaration we set forth a frustrating situation in which two providers were attempting to share owner-owned wiring at a large MTE managed by E&S Ring in southern California that contains nearly 1,000 residential units. These frustrations arose after E&S Ring had made an approximately $1.3 million investment in the internal wiring at the MTE to accommodate multiple providers. As we described in 2017, rather than cooperate in the shared used use of the wiring, one of the providers ("Provider X") "treated the owner-owned inside wiring as though it was its own wiring over which it had exclusive dominion and control." The actions by Provider X resulted in the other provider serving the MTE ("Provider Y") often being unable to access the internal wiring that was supposed to be used on a shared basis by both providers.

6. Several developments have transpired at this MTE since we submitted the 2017 Declaration that reinforces our conviction that, in shared wiring situations, providers tend to use the wiring as they please without respect to their competition or, more critically, the consumers who live at the building. We believe these new developments are worth sharing with the Commission and they are set forth below. This situation happened to E&S Ring even though we invested in and manage the inside wiring and even though we entered contracts with both providers that spell out each provider's rights and obligations with respect to the inside wiring. In a situation where there were no contracts and where each provider could "share" internal wiring without any controls or oversight, we are convinced things would be even worse.

7. The frustrations described in the 2017 Declaration pertaining to Provider X's failure to cooperate in the shared use of the owner-owned internal wiring continued into 2018. As the number of resident complaints increased, E&S Ring contracted with telecommunications consultant Joan Harvey. Ms. Harvey worked directly with frustrated residents who routinely experienced service activation delays and ongoing service issues due to the problems caused by Provider X. E&S Ring also contracted with a low voltage contractor to help. When residents complained, Ms. Harvey would make arrangements on the resident's behalf and set up an on-site meeting between Provider X's technicians and the low voltage contractor to resolve the resident's complaint. These extra costs incurred by E&S Ring were directly related to Provider X's inability or unwillingness to cooperate in the shared use of the internal wiring. Provider Y, on the other hand, continued to cooperate and follow proper procedures in the shared use of the inside wiring.

8. During this time period, Provider X's service contract at the MTE was close to expiration so Provider X approached E&S Ring about entering a renewal contract so that it could continue to offer broadband service to the MTE once its current contract expired. Negotiations on a new contract continued into 2019. As part of the negotiations, E&S Ring insisted on including a specific contractual provision that described the shared use of the inside wiring with Provider Y and the precise method that Provider X must use to connect to the inside wiring, which connections are to be made ONLY via neutral facilities that E&S Ring installed at the MTE at its own cost. The language was negotiated at arms' length between E&S Ring's attorney and the attorney for Provider X. After months of back and forth, Provider X's renewal contract was approved and went into effect at the MTE on November 1, 2019.

9. Despite the new renewal contract and the negotiated *shared use/neutral facilities* provision that was negotiated with and approved by Provider X, the same problems continued at the MTE and are ongoing to this day. Residents continue to experience service issues and technicians and Provider X continue to ignore the contractual provisions and treat the internal wiring as though it was Provider X's property. Word about the "shared use of wiring" has apparently not been properly passed along to Provider X's technicians who actually do the on-site work at the MTE. Our telecommunications consultant Joan Harvey is in touch with Provider X on what is almost a weekly basis due to frustrations voiced by residents. Below is a list of some of the negative experiences in 2021, which are the direct result of Provider X's failure to share the internal wiring properly and in accordance with its contractual obligations:

- On February 8, 2021, Ms. Harvey received a complaint from E&S Ring's low voltage contractors that says Provider X's appear to be "trashing our feed cables again." The contractor said it appeared that, instead of using the neutral facilities, Provider X cut the cables being used by Provider Y and then spliced those cables directly into Provider X's own cabinet, bypassing the neutral facilities altogether and in clear violation of the renewal contract Provider X signed in 2019. Residents in some units were not able to receive Provider Y's services as a result of this improper activity by Provider X. Ms. Harvey contacted Provider X immediately to seek resolution.

- On February 18, 2021, Ms. Harvey met at the MTE for a site visit with supervisors from Provider X, including a Field Office Supervisor. Ms. Harvey explained the issues and showed the Provider X supervisors the specific neutral facilities that Provider X should be using to connect to the inside wiring. The Provider X supervisors explained to Ms. Harvey that the standard training their technicians receive does not include connection to inside wiring via neutral facilities and that their technicians had been following standard procedures when they cut the wiring that Provider Y was using. While the site visit was useful for

identifying the issues, Provider X could not assure Ms. Harvey that the MTE would not continue to experience the same problems.

- Even following the February 12 site visit, Ms. Harvey continued to hear complaints and frustrations from residents not being able to receive broadband service due to an issue pertaining to Provider X's inability or unwillingness to cooperate with the shared use of wiring. Ms. Harvey heard from a resident in a different unit on each of the following dates:

  March 3, 2021
  March 16, 2021
  April 5, 2021
  April 26, 2021
  May 11, 2021
  June 23, 2021
  July 21, 2021
  August 9, 2021

- On each of these occasions, Ms. Harvey would dispatch the low voltage contractor retained by E&S Ring to assess the problem and then she would eventually contact Provider X's Field Office Supervisor to resolve it.

- While this system has helped to prevent long-term service issues, it has not eliminated many of the short-term service activation delays that our residents have experienced. It also should not be necessary for E&S Ring to expend the type of resources we are forced to expend on this project simply because one of the providers (Provider X) either cannot or will not participate cooperatively in a shared wiring situation, despite its contractual obligations to do just that.

- We again reiterate that we have not had these problems with the other provider (Provider Y) who is a smaller company and who apparently does a better job training its technicians.

10. In light of our experiences, E&S Ring supports the Real Estate Association's opposition to any new rules or regulations that would mandate "shared access" to any inside wiring owned by an MTE owner. Based on our experience in the marketplace, E&S Ring strongly rejects the idea that providers who are given unfettered access to owner-owned wiring will do so in a cooperative manner. As our experience shows, service providers do NOT willingly cooperate with each other in these shared wiring situations, and that lack of cooperation leads to service disruptions and a poor broadband experience for our residents.

11. E&S Ring continues to believe that the current approach to MTE wiring use - allowing the free market to dictate wiring arrangements - has proven an effective way for both the MTE owner and service providers to provide MTE residents competitive broadband choices while at the same time ensuring that MTE wiring is properly maintained, used and repaired.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on October 14, 2021

Kevin Hott

EXHIBIT K

Key Terms of Mandatory Access Statutes

KEY TERMS OF MANDATORY ACCESS STATUTES

Cable Television, with Notification Procedure

State	Statute	Applies to:	Responsibility for Installation Costs	Specifies Process for Access
DC	D.C. Code § 34–1261.01	Cable operator.	Cable operator or the tenant or both bear the entire cost of the installation.	No.
IL	55 ILCS 5/5-§ 1096 (2021)	Community antenna television company.	Not specified presumed to be the operator.	Yes
MA	Mass. Gen. L. Ch. 166A § 22	CATV System.	Operator bears all costs.	Yes
NJ	N.J. Stat. § 48.5A-49	Cable television service.	Not specified presumed to be the operator	No
NY	CLS Pub Ser § 228	Cable television company.	Cable television company (or the tenant or a combination thereof) bear the entire cost	No
PA	68 P.S. §§ 250.503-B, 250.504-B, 250-505-B (2019)	CATV	Not specified;. presumed to be the operator.	Yes
WV	WV Stat. § 24D-2-3	Cable television facilities.	Not specified presumed to be the operator	No

Video Service Providers, with Notification Procedure

State	Statute	Applies to:	Responsibility for Installation Costs	Specifies Process for Access
NV	Nev. Rev. Stat. Ann § 711.255	Video service providers.	Operator bears entire cost.	Yes
WI	Wis. Stat. §66.0421 (2021)	Video service provider.	Not specified; presumed to be the operator.	Yes.

Cable and Other Communications, with Notification Procedure

State	Statute	Applies to:	Responsibility for Installation Cost	Specifies Process for Access
CT	Conn. Gen. Stat. § 16-333a (2021) Conn. Gen. Stat. § 16-333f(c)	Community antenna television service companies and certified competitive video service providers.	Operator bears cost.	Yes
ME	Me. Rev. Stat. Ann. Tit. 14, § 6041 (2020)	Cable television and over the air reception devices.	Operator bears all costs.	Yes
MN	Minn. Stat. Ann. §§ 238.23, 238.24 238.25 238,26, 238.27,	Cable communications systems, provided wiring installed with capacity for use by competitor.	Operator bears all costs.	Yes
RI	R.I. Gen. Laws §39-19-10	cable television, telephone, telecommunications, or information service	Provider bears all costs.	Yes

General Access to Property or Easements

State	Statute	Applies to:	Responsibility for Installation Cost	Specifies Process for Access
DE	26 De. C. §613	Franchisee providing cable television or communications service	Not specified; presumed to be the operator.	No.
IA	Iowa Code § 477.1	Telephone lines or cable systems	Not specified- presumed to be the operator.	No
KS	Kan. Stat. Ann. § 58-2553(a)(5) (2020)	Franchised communication or cable television service	Not specified; presumed to be the operator.	No
OH	ORC §§ 4931.04, 4931.05	Telephone company or communications providers	Not specified; presumed to be the operator.	No.

No Mandatory Access for Video in Apartments

State	Statute	Applies to:	Responsibility for Installation Cost	Notes
FL	Fla. Stat. Ann. § 718.1232 (2021)	Providers of franchised or licensed cable television service.	Not specified; presumed to be the operator.	Applies to condominiums only.
TX	Texas Utilities Code §§ 54.259 – 261; 16 TAC § 26.129	Telecommunications utility.	Operator and/or the tenant bears entire cost.	Not applied to video service in apartments.
VA	Va. Code Ann. § 55.1-1222	Provider of cable television service, cable modem service, other television service.	Operator (and the tenant) bear entire cost.	No mandatory access.